UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS 24C-06–09 OF 2014 AND 24C-05–09 OF 2014
MARY LIM J
5 DECEMBER 2014

Building and Construction Law — Construction contracts — Adjudication of payment disputes — Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Claim for non-payment of certified sums, non-certification and wrongful deduction of liquidated damages — Whether claim outside purview of CIPAA — Whether CIPAA has retrospective application to claims crystallising before coming into effect of CIPAA — Whether adjudicator had jurisdiction to adjudicate on claims — Whether issues of extensions of time come under purview of CIPAA — Construction Industry Payment and Adjudication Act 2012 ss 2 & 9

Building and Construction Law — Construction contracts — Adjudication of payment disputes — Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Jurisdiction of courts — Whether substantive issues such as locus standi, scope of CIPAA, jurisdiction of adjudicator must be taken up before the adjudicator first instead of the court

Two originating summons were heard together. Both cases involved unincorporated consortiums undertaking construction projects in Malaysia. In both cases, the unincorporated consortiums initiated adjudication proceedings under s 9 of the Construction Industry Payment and Adjudication Act 2012 ('the Act') for, inter alia, non-payment of certified sums, non-certification and payment for variations orders, wrongful deduction of liquidated damages, and wrongful set off from interim payment certificates. The respondents in both cases who were the plaintiffs here raised, inter alia, the following objections: (a) that the unincorporated consortiums being unregistered entities were not proper parties to bring the actions as they were not legal entities and not recognised in law and consequently had no locus standi to bring the adjudication proceedings; (b) that the claim in the adjudication notices were outside the purview of the Act which has no retrospective application as the adjudication claims arose and crystallised before the coming into effect of the Act and as such, an adjudicator had no jurisdiction to adjudicate on the said claims under the Act; and (c) that the adjudication claims concerned issues of extensions of time ('EOT') which was not a payment claim that comes under the purview of the Act. Since the adjudicators nevertheless decided to proceed

with the adjudication, the plaintiffs made the present applications for declaratory orders based on the objections raised. A

Held, dismissing the applications with no order as to costs:

(1) The payment disputes arise under the construction contract that underpins the relationship between the parties; and Parliament has decided to legislate by reference to the construction contract and not, the payment dispute. That is the material or relevant point of reference; and not the date of the payment dispute. Section 2 of the Act is patently clear as to what is the material determinant; that it is by reference to the construction contract and nothing else (see paras 155 & 158). B C

(2) Since the Act is to provide a speedy procedure for the temporary resolution of payment disputes in construction contracts through the introduction of a fresh or new forum called 'adjudication', such legislation is in character, truth and substance, procedural and adjectival legislation. Such legislation or statute is presumed in law to be applied retrospectively unless there is clear contrary intention in the statute itself (see para 160). D

(3) The Act which provides adjudication as an alternative forum for payment dispute resolution as opposed to resorting to the court and arbitration, a liberal and purposive interpretation must be adopted in relation to the Act. In so doing, the choice of an additional forum of resolution should surely be offered to all unless there is clear provision that it is not. Since there are no such provisions to allow for such an interpretation, the Act is retrospective insofar as the construction contracts are concerned; and that would include the present construction contracts (see para 173). E F

(4) It is the clear intention of Parliament that the Act applies to all construction contracts regardless of when those construction contracts were made; and that would extend to the payment disputes that arise under those construction contracts. The Act applies so long as the construction contracts are made in writing and that such construction contracts are carried out either wholly or partly within the territory of Malaysia. The only exception to this are those payment disputes where proceedings in relation to such disputes have already been commenced either by way of court proceedings or arbitration before the operation of the Act, that is, before 15 April 2014 (see para 225). G H

(5) The issues of locus standi, scope of the Act, jurisdiction of the adjudicator etc are substantive issues which should be and are more properly to be taken up first before the adjudicator instead of before the court. The court therefore declined to entertain these issues at this stage (see para 226). I

[Bahasa Malaysia summary

Dua saman pemula didengar bersama. Kedua-dua kes melibatkan konsortium yang tidak diperbadankan menjalankan projek pembinaan di Malaysia. Dalam kedua-dua kes, konsortium yang tidak diperbadankan memulakan prosiding adjudikasi di bawah s 9 Akta Industri Pembinaan Pembayaran dan Adjudikasi 2012 ('Akta') untuk, antara lain, kegagalan membayar jumlah wang yang diperakui, tidak pensijilan dan pembayaran untuk variasi pesanan, salah potongan ganti rugi jumlah tertentu, dan penolakan salah dari perakuan bayaran interim. Responden dalam kedua-dua kes yang merupakan plaintif dalam kes ini membangkitkan, antara lain, bantahan berikut: (a) bahawa konsortium yang tidak diperbadankan menjadi entiti yang tidak berdaftar bukan pihak yang betul untuk membawa tindakan kerana mereka entiti yang tidak sah dan tidak diiktiraf dalam undang-undang dan seterusnya tidak mempunyai locus standi untuk membawa prosiding adjudikasi; (b) bahawa tuntutan dalam notis adjudikasi berada di luar bidang kuasa Akta yang tidak mempunyai aplikasi retrospektif kerana tuntutan adjudikasi timbul dan menjadi jelas sebelum permulaan kuat kuasa Akta dan oleh itu, seseorang adjudikator tidak mempunyai bidang kuasa untuk mengadili ke atas tuntutan tersebut di bawah Akta; dan (c) bahawa tuntutan adjudikasi berkenaan isu lanjutan masa ('EOT') yang bukan satu tuntutan pembayaran yang berada di bawah bidang kuasa Akta. Memandangkan adjudikator walau bagaimanapun memutuskan untuk meneruskan adjudikasi, plaintif membuat permohonan ini untuk perintah deklarasi berdasarkan bantahan yang dibangkitkan.

Diputuskan, menolak permohonan tanpa perintah terhadap kos:

(1) Pertikaian bayaran timbul di bawah kontrak pembinaan yang menguatkan hubungan antara pihak-pihak; dan Parlimen telah memutuskan untuk menggubal undang-undang dengan merujuk kepada kontrak pembinaan dan tidak, pertikaian pembayaran tersebut. Itu adalah material atau titik rujukan yang relevan dalam rujukan; dan bukan tarikh pertikaian pembayaran. Seksyen 2 Akta adalah terang-terang jelas tentang apa yang penentu material; bahawa ia adalah dengan rujukan kepada kontrak pembinaan dan bukan yang lain (lihat perenggan 155 & 158).

(2) Oleh kerana Akta ini adalah untuk memperuntukkan prosedur yang cepat untuk penyelesaian sementara pertikaian pembayaran dalam kontrak pembinaan melalui pengenalan satu forum segar atau baru yang dikenali sebagai 'adjudication', undang-undang itu adalah bersifat, benar dan teguh, prosedur dan undang-undang adjektif. Undang-undang sedemikian atau statut itu dianggap dari segi undang-undang yang akan digunakan secara retrospektif melainkan jika terdapat niat yang jelas bertentangan dalam statut itu sendiri (lihat perenggan 160).

(3) Akta yang memperuntukkan penghakiman sebagai forum alternatif

untuk penyelesaian pertikaian pembayaran bertentangan dengan mengambil jalan membawa kepada mahkamah dan timbang tara, tafsiran liberal dan maksud perlu diguna pakai berhubung dengan Akta. Dengan berbuat demikian, pilihan forum tambahan resolusi patut semestinya ditawarkan kepada semua melainkan jika terdapat peruntukan yang jelas bahawa ia tidak. Oleh kerana tidak ada apa-apa peruntukan untuk membenarkan tafsiran seperti ini, Akta adalah retrospektif setakat mana berhubung dengan kontrak pembinaan; dan ini akan melibatkan kontrak pembinaan ini (lihat perenggan 173).

(4) Ia adalah niat jelas Parlimen bahawa Akta terpakai kepada semua kontrak pembinaan tidak kira bila kontrak-kontrak pembinaan telah dibuat; dan yang akan meliputi pertikaian pembayaran yang timbul di bawah kontrak-kontrak pembinaan tersebut. Akta terpakai selagi kontrak pembinaan dibuat secara bertulis dan bahawa kontrak pembinaan itu dijalankan sama ada keseluruhannya atau sebahagiannya di dalam wilayah Malaysia. Satu-satunya pengecualian kepada ini adalah dari pertikaian pembayaran di mana prosiding berhubung dengan pertikaian itu telah pun dimulakan sama ada melalui prosiding mahkamah atau timbang tara sebelum operasi Akta, iaitu sebelum 15 April 2014 (lihat perenggan 225).

(5) Isu locus standi, skop Akta, bidang kuasa adjudikator dan lain-lain adalah isu-isu substantif yang perlu dan lebih wajar dibawa terlebih dahulu di hadapan adjudikator dan bukannya di mahkamah. Oleh itu mahkamah enggan melayan isu-isu ini pada peringkat ini (lihat perenggan 226).]

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B *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 AC 486, HL (refd)
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Lee Chow Meng v PP [1978] 2 MLJ 36, FC (distd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1; [1996] 1 CLJ 529, FC (refd)
C *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) 64 Con LR 1, HC (refd)
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D *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39, SC (refd)
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Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd [2003] NSWSC
E 365, SC (refd)
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Q Civil & Construction Pty Ltd v Nadler [2013] TASMC 45 (refd)
F *RHB Bank Bhd v Ya' akob bin Mohd Khalib @ Abdul Ghani bin Muhammad* [2008] 1 MLJ 157, CA (distd)
RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd [2002] EWCA Civ 270, CA (refd)
RN & Associates Pte Ltd v TPX Builders Pte Ltd [2013] 1 SLR 848, HC (refd)
G *Rees v Firth* [2011] NZCA 668; [2012] 1 NZLR 408, CA (refd)
Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd [2013] SASCFC 99, SC (refd)
Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd [2013] SADC 39 (refd)
H *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2)* [2013] SASCFC 124, SC (refd)
Shyam Sunder And Others v Ram Kumar And Another AIR 2001 SC 2472, SC (refd)
Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ
I 292; [1995] 1 CLJ 491, CA (distd)
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Construction Contracts (Security of Payments) Act 2004 (Northern Territory) [AU]
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Construction Contracts Act 2002 [NZ] ss 3, 12, 15, 16, 17, 18
Construction Industry Payment and Adjudication Act 2012 ss 2, 3, 4, 5, 5(2), 6(4), 7(1), 8(1), 9, 12(2), 13, 15, 16, 17, 18, 21, 25, 28, 29, 30, 32, 33, 35, 35(2), 36, 37, 37(1), 41, Part I, Part II, Part III, Part IV, Part V, Part VI, Part VII
Consumer Credit Act 1974 [UK] s 127(3)

Consumer Protection Act 1999 s 2(1), (2), (2)(c)
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Federal Constitution art 7
Housing Developers (Control and Licensing) Act 1966
Housing Grants, Construction and Regeneration Act 1996 [UK] ss 104(6), 108, Part II, Chapter 53
Human Rights Act 1998 [UK] Schedule 1
Interpretation and General Clauses Ordinance 1948 s 13
Interpretations Act 1948 and 1967 ss 17A, 29, 30
Licensee Supply Regulations 1990 reg 11(2)
Public Authorities Protection Ordinance 1948 s 2
Rules of the High Court 1980 O 29, O 29 r 2B
Social Security Act 1998 [UK]

James P Monteiro (John S Skelchy, Mohd Azfar Abdullah and Hilwa Bustam with him) (James Monteiro) in Originating Summons No 24C-06–09 of 2014 for the plaintiff.

Raymond Mah (Hannah Patrick and Timothy Omamalin with him) (Mah Weng Kwai & Assoc) in Originating Summons No 24C-05–09 of 2014 for the plaintiff.

Muhammad Faisal Moideen (Mohamed Reza Abdul Rahim and Shazwani Abdul Karim with him) (Moideen & Max) in Originating Summons No 24C-06–09 of 2014 for the defendants.

Sanjay Mohanasundram (Adam Lee with him) (Kadir Andri & Partners) in Originating Summons No 24C-05–09 of 2014 for the defendants.

Mary Lim J:

INTRODUCTION

[1] The Construction Industry Payment and Adjudication Act 2012 (Act 746) ('CIPAA') is a much awaited piece of legislation. For years, the idea of establishing such a regime was bandied around both in the construction industry and the legal profession that serves that industry. It would be fair to say that until the Arbitration Act of 2005 (Act 646) was ensconced in the legal landscape, and that piece of legislation was itself long in making its appearance, the idea of introducing and adopting the English practice of adjudication was seen with much scepticism. So, when CIPAA was finally enacted by Parliament in 2012, it was welcomed with much fanfare. Numerous courses, seminars, lectures, conferences were organised to introduce and familiarise all who were either affected by or simply interested or curious to know about CIPAA. Many assumed training as adjudicators, anticipating to play some role when the Act was enforced.

[2] Little did anyone know that CIPAA was not to come into force for another two years. It was not until 15 April 2014 that at the simultaneous launch of the Construction Court at Kuala Lumpur and Shah Alam, the Minister in charge announced that CIPAA would come into force on that same day. 'Business' under CIPAA then started.

[3] The present two originating summonses relate to two adjudication claims which are amongst the firsts to be conducted under CIPAA. The adjudicators are appointed by the Kuala Lumpur Regional Centre for Arbitration ('KLRCA'), the body cloaked with authority to administer matters related to adjudication under CIPAA.

[4] Both originating summonses were filed around the same time. Initially, the two cases were heard separately. This court had already reserved the first case (Originating Summons No 24C-06–09 of 2014) for decision when the second case (Originating Summons No 24C-05–09 of 2014) was heard. Upon hearing submissions in the second case, the court was of the view that the two cases ought to be heard together given that there were many common issues, and because both cases have raised similar issues of law which are being considered for the first time under CIPAA. The court then directed the submissions in both cases to be made available to the parties in the other case so that all can and will benefit from fuller and comprehensive arguments in order that those issues can be properly considered. All parties were agreeable.

[5] When the two cases were called, the court invited the parties to submit on the application, if at all, of the Federal Court's decision in *Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah* [2006] 1 MLJ 339; [2004] 4 CLJ 203; and several other aspects which were not considered at all by the parties in their earlier submissions. Subsequently, all parties made further submissions; and this is the court's decision in both cases.

[6] 'CIPAA' or 'the Act' shall be referred to interchangeably here. One of the central issues in both cases concerns the operation of the Act, whether it applies to payment disputes and construction contracts that were made prior to the coming into force of the Act. There are other issues too; namely whether the claimants have the necessary legal capacities to initiate or refer the dispute to adjudication; whether the dispute referred included matters which were beyond the scope of the Act; and whether the adjudicators could decide on matters related to their jurisdiction or should such matters be referred to the court for determination. However, for obvious reasons, the decision on the application and operation of the Act needs to be answered first before the other issues can be decided.

[7] The court wishes to record its appreciation to all counsel and members of their respective teams. Their research and submissions have been prompt, extensive and, helpful. All counsel and their team members are further to be commended for having conducted themselves most admirably. Further, the court wishes to record its appreciation to KLRCA, who offered to attend as amicus curiae when the first case was called up. KLRCA's offer was accepted.

THE TWO CASES BEFORE THE COURT

The first case (Originating Summons No 24C-06–09 of 2014)

[8] These are the relevant cause papers:

(a) the plaintiff's originating summons dated 19 September 2014;

(b) the plaintiff's affidavit-in-support affirmed by Fadzidah bt Hashim on 18 September 2014; and

(c) the defendants' affidavit-in-reply affirmed by Ahmad Sharifuddin bin Abdul Rahman on 29 September 2014.

[9] On 5 January 2009, the first and second defendants jointly as an unincorporated consortium ('the said consortium') submitted a tender to the plaintiff for the purposes of constructing a project known as 'Baki-Baki Kerja-Kerja Substruktur, Kerja-Kerja Superstruktur dan Infrastruktur Bagi Cadangan Pembangunan Pangsapuri Perkhidmatan (285 Unit) 34 Tingkat Termasuk 7 Tingkat Podium Tempat Letak Kereta dan 1 Tingkat Separa Besmen Beserta Kemudahan Penduduk di atas Lot 380, Seksyen 96, Jalan Maarof, Bangsar Kuala Lumpur' ('the project').

[10] The plaintiff vide letter of acceptance dated 24 February 2009 notified to the said consortium of its acceptance subject to a formal contract being executed. The cost of the project was RM110m. A formal contract dated 16 October 2009 was subsequently made between the parties. Pursuant to cl 40 of the formal contract, the liquidated and ascertained damages was agreed at RM33,000 per day; while cl 47(d) provided that the plaintiff was to make payment to the defendants on the amount certified as due in the said certificates within 21 days from the date of issuance of the certificates.

[11] The said consortium initiated an adjudication proceeding against the plaintiff vide a notice of adjudication in respect of the following purported disputes:

(a) non-payment of certified sums of RM3,477,858.25;

(b) non-certification and payment for variations orders submitted by the consortium of RM2,300,768.32;

(c) wrongful deduction of liquidated damages of RM4,851,000; and

(d) wrongful set off from interim payment certificate IPC 26(R3) of RM148,046.84.

[12] The following reliefs were sought from the adjudicator:

(a) an appropriate interim or penultimate payment certificate for all sums verified and approved by the SO and consultants for a final contract sum of RM109,899,768.32;

(b) an appropriate extension of time certificate to 24 November 2011;

(c) payment of the sum of RM10,777,673.41; and

(d) interest, cost and/or any other relief against the respondent in relation to this payment claim as may be appropriate.

[13] The said consortium submitted its adjudication claim on 20 August 2014 under s 9 of the CIPAA. In its adjudication claim, the payment dispute involves, inter alia, the following:

(a) non-payment of certified sums amounting to RM3,477,858.25 pending a decision by the managing director of the plaintiff on the final account;

(b) non-certification and payment for variations to the contract amounting to RM2,300,768.32 pending a decision by the managing director of the plaintiff on the final account;

(c) wrongful deduction of LAD amounting to RM4,851,000 pending a decision by the managing director of the plaintiff on the final account; and

(d) wrongful set off from interim payment certificate IPC 26(R3) amounting to RM148,046.84 pending a decision by the managing director of the plaintiff on the final account.

[14] The plaintiff caused its solicitors to issue a letter to the learned adjudicator and the defendants on 29 August 2014 stating, inter alia, as follows:

(a) that the claimant in the adjudication notice, namely the said consortium being an unregistered entity, is not a proper party to bring the action as it is not a legal entity and not recognised in law and consequently has no locus standi to bring the adjudication proceedings;

(b) that the claim in the adjudication notice is outside the purview of CIPAA which has no retrospective application as the adjudication claim

arose and crystallised before the coming into effect of CIPAA and as such, an adjudicator has no jurisdiction to adjudicate on the said claim under CIPAA; and

(c) that the adjudication claim brought by the consortium concerns issues of extensions of time ('EOT') which is not a payment claim that comes under the purview of CIPAA.

[15] Both the learned adjudicator and the said consortium responded to the plaintiff's letter; the earlier stating, inter alia, of his intention to proceed with the adjudication proceedings brought by the consortium purportedly under CIPAA; the latter disagreeing with the plaintiff's position. Following this, the plaintiff filed its adjudication response with reservations on 5 September 2014 stating, inter alia, as follows:

(a) that it objected to the jurisdiction of the learned adjudicator to adjudicate the claim as the same was outside the purview of the CIPAA wherein claims submitted concerned issues that arose and/or crystallised long before the coming into force of the CIPAA, ie on 15 April 2014;

(b) that it objected to the validity of the said notice of adjudication and/or adjudication claim in light of the fact that the said consortium has no locus standi and/or legal capacity to initiate and/or sustain the same;

(c) that the adjudication claim concerns issues on EOT which is not a payment dispute that comes within the purview of CIPAA; and

(d) that the conditions of contract clearly do not provide for a penultimate payment certificate.

[16] The said consortium served the plaintiff with an adjudication reply dated 11 September 2014.

[17] The adjudication proceedings are now pending decision of the learned adjudicator. Under CIPAA, that decision has to be delivered before 8 November. The plaintiff rushed an urgent application to move this court for declaratory orders which are not dissimilar to those raised in its adjudication response.

The second case (Originating Summons No 24C-05–09 of 2014)

[18] These are the relevant cause papers:

(a) amended originating summons dated 24 September 2014;

(b) the plaintiff's affidavit-in-support affirmed by Hong Fook Kam on 8 September 2014;

(c) the plaintiff's affidavit-in-support No 2 affirmed by Hong Fook Kam on 19 September 2014;

(d) the defendant's affidavit-in-reply affirmed by Thomas Samuel a/l CT Samuel on 2 October 2014; and

(e) the plaintiff's affidavit-in-reply affirmed by Hong Fook Kam on 7 October 2014.

[19] In this second case, there are similar objections to those found in the first case. There are objections on jurisdiction of the adjudication and/or adjudicator; as well as to the locus standi of the claimant, and more.

[20] What had happened here was that the defendant had submitted a revised tender for earthwork, pilings, construction of diaphragm walls and basement substructure for the 'Proposed Integrated Commercial Development on Lot 37, Part of CL 015561878 at Sembulan, Jalan Pantai Baru, Kota Kinabalu, Sabah (Phase 1)' sometime in January 2013. A letter of award dated 13 May 2013 was signed between the plaintiff, the defendant and Sara-Timur Sdn Bhd. The contract sum is RM61,690,000.

[21] In the course of carrying out the works, a dispute arose in relation to the rates for bored piling works rates. The defendant was informed by the QS that he had rationalised the applicable rates. The defendant objected to the new rates and was invited by the QS to counter propose its rates.

[22] There was no agreement on the rates; and the QS proceeded to prepare interim valuation No 6 based on the rationalised rates. The defendant refused to accept the related payment certificate No 6. This led to the SO of the project issuing the payment certificate on 15 April 2012. Subsequently, a PAM adjudication was carried out and a decision was delivered on 30 May 2014. By that decision, it was decided that the rationalisation was justified and reasonable; and that interim certificate No 6 was applicable.

[23] By letter dated 10 July 2014, the defendant's solicitors, Kadir Andri & Partners ('KAAP') issued a payment claim dated 9 July 2014 on behalf of 'Sara Timur-Bauer JV' for the amount of RM4,969,897.83. The plaintiff replied through its solicitors on 25 July 2014 raising a preliminary objection to the payment claim on the basis that 'Sara-Timur Bauer JV' was not a legal entity.

[24] KAAP subsequently issued a notice of adjudication in the name of 'Sara Timur-Bauer JV' on 30 July 2014. In the notice of adjudication, KAAP proposed the appointment of Mr Rodney Martin as the adjudicator. On 7 August 2014, KAAP issued a notice to the Director of KLRCA to register the adjudication proceedings on behalf of this time, 'Sara-Timur Bauer JV'.

[25] By separate letters both dated 12 August 2014, the plaintiff wrote to KAAP maintaining its earlier objection and raising additional objections and jurisdictional challenges to the adjudication proceedings. Two days later, 'Sara Timur-Bauer JV' wrote to KLRCA for the appointment of an adjudicator pursuant to CIPAA. On 19 August 2014, KLRCA appointed Mr Gananathan Pathmanathan as the CIPAA adjudicator. To this, the plaintiff responded maintaining its earlier objections including now, the appointment of the CIPAA adjudicator.

[26] On 21 August 2014, the CIPAA adjudicator informed the parties of his terms of appointment. Both parties agreed to the terms; although in the case of the plaintiff, it was with reservations to its right to raise jurisdictional challenges in the adjudication proceedings or to seek necessary relief from the court.

[27] 'Sara Timur-Bauer JV' issued the adjudication claim on 11 September 2014 to which the plaintiff wrote to the CIPAA adjudicator immediately requesting for an immediate stay of the adjudication proceedings. The plaintiff also applied for an interim stay of the timeline imposed under the Act, in particular for the filing of the adjudication response, pending the CIPAA adjudicator's decision on the plaintiff's stay application.

[28] The CIPAA adjudicator then fixed an adjudication meeting on 17 September 2014. At that meeting, the CIPAA adjudicator disclosed facts that may give rise to lack of independence and/or impartiality to the mind of the CIPAA adjudicator. The meeting was adjourned to the next day for the plaintiff's solicitors, to obtain the plaintiff's instructions on the disclosure. On 18 September 2014, the plaintiff applied that the CIPAA adjudicator resign on the grounds of a lack of independence and/or impartiality. The CIPAA adjudicator reserved his decision to 23 September 2014.

[29] Meanwhile, the plaintiff filed for an ex parte interim injunction application from the court on 22 September 2014 to restrain the CIPAA adjudicator and the defendant from pursuing the adjudication proceedings. An application to amend the original originating summons dated 9 September 2014 was also filed on 22 September 2014. This application to amend the originating summons was subsequently allowed by the court on 23 September 2014.

[30] Two days later, on 25 September 2014, the plaintiff withdrew the interim injunction application when the court fixed the originating summons for substantive hearing on 14 October 2014. On 1 October 2014, the defendant applied to the CIPAA adjudicator to amend the claimant's name in the payment claim dated 9 July 2014 and the notice of adjudication dated 30

July 2014 from 'Sara-Timur Bauer JV' to 'Bauer (Malaysia) Sdn Bhd and Sara-Timur Sdn Bhd (Sara-Timur Bauer JV)'. At the time of hearing of the second case, the matter is pending before the CIPAA adjudicator. Suffice to say, for the purposes of the case in court, there are objections to jurisdiction and locus standi aside from the scope of the application of CIPAA, in the event the court finds that the Act applies to the payment dispute in question.

[31] The plaintiff in its originating summons prays for, inter alia, the following orders:

(i) a declaration that 'Sara-Timur Bauer JV' and/or 'Sara Timur – Bauer JV' is not a legal entity and does not have locus standi to commence or maintain proceedings under CIPAA;

(ii) a declaration that the adjudicator appointed by Kuala Lumpur Regional Centre for Arbitration on 19 August 2014 or any date thereafter pursuant to CIPAA does not have jurisdiction to hear and decide the dispute described in the payment claim dated 9 July 2014 issued by 'Sara-Timur Bauer JV' and/or 'Sara Timur – Bauer JV' as the payment claim dated 9 July 2014 is null and void;

(iii) a declaration that the CIPAA adjudicator does not have jurisdiction to hear and decide the dispute arising from the letter of award dated 13 May 2013 as CIPAA which came into force on 15 April 2014 does not apply retrospectively to the letter of award dated 13 May 2013;

(iv) in the alternative to prayer (3) above, a declaration that the CIPAA adjudicator does not have jurisdiction to hear and decide the dispute in respect of the dispute on rock coring for bored piling rates as CIPAA which came into force on 15 April 2014 does not apply retrospectively to the dispute on rock coring for bored piling rates that arose on 28 January 2014; and

(v) a declaration that the CIPAA adjudicator does not have jurisdiction to hear and decide the dispute in respect of the dispute on rock coring for bored piling rates as the dispute on rock coring rates has been resolved according to the provisions of the PAM Contract 2006 and the defendant is estopped from re-adjudicating this dispute under CIPAA.

THE ISSUES

[32] The central issue in both cases relates to the operation and application of CIPAA; whether the Act applies to payment disputes and their underlying contracts which arose before the coming into force of CIPAA on 15 April 2014. The other common issues relate to the locus standi of the claimants in the adjudication proceedings, the scope and jurisdiction of the adjudicator and adjudication proceedings. The contentions of the plaintiffs in both cases are

A that the answers to the primary issue of the application of the Act to the relevant adjudication is in the negative rendering thereby the adjudication proceedings null and void.

Submissions on the operation and application of CIPAA

B

Summary of positions taken by the respective counsel

[33] The plaintiffs in both cases, the defendant in the second case as well as KLRCA have all made a distinction in their arguments when responding to this C first issue on whether CIPAA applies retrospectively or prospectively. The defendant in the first case did not see it necessary and he has taken an entirely different position from the rest. However, as will become clear, the answers offered or positions taken by all the parties including KLRCA differed. This is a summary of the submissions made by all those parties. D

[34] KLRCA (Mr Lam Wai Loon appeared on its behalf) submitted that the question had to be addressed from two perspectives; that of the construction contract itself and that of the payment claim. Insofar as the construction E contract is concerned, the Act applies regardless when that contract was made. In other words, the Act applies retrospectively. However, when dealing with the issue of payment claims that arose under those construction contracts, the payment claims must have arisen after the Act came into force. This position is reflected in a circular issued by KLRCA. Learned counsel urged the court to F adopt the approach taken by KLRCA.

[35] KLRCA's position was not shared by all the other parties in the two cases before the court. It was however, shared by the plaintiff in the first case. Mr Monteiro submitted that CIPAA cannot have any retrospective effect. The Act G only applies prospectively to payment disputes that arise and crystallise after the Act has come into force; and that was on 15 April 2014. It was Mr Monteiro's submissions that since not only the payment disputes in the first case arose before CIPAA came into force but so did the construction contract; the adjudication claim and the related adjudication proceedings were thereby H null and void. Learned counsel was however, prepared to accept that the Act may apply to construction contracts (under which the payment disputes arose) which were made before the coming force of the Act.

I **[36]** Learned counsel for the defendant in the first case, Mr Faisal, submitted that the Act applies retrospectively in all respects, be it for the construction contract or, for the payment claim. His client's case was therefore validly lodged under CIPAA.

[37] As for the plaintiff in the second case, its learned counsel, Mr Mah submitted that CIPAA could only apply prospectively to both the construction contract and any payment claims that may arise under the construction contract. The defendant in this second case disagreed with him. Its learned counsel, Mr Mohanasundram, shares the views taken by counsel for the plaintiff in the first case and by KLRCA. However, he added that his client's claim was valid as it was a payment claim which arose after the Act had come into force.

Submissions of UDA Holdings Bhd

[38] Mr Monteiro, learned counsel on behalf of UDA Holdings Bhd, submitted that CIPAA has no retrospective effect. This was because there were no express provisions within the Act itself providing for such a reading. According to learned counsel, since CIPAA applies to payment disputes, the Act could therefore only apply to payment claims which arose and crystallise after the Act had come into force. In other words, it only applies prospectively to payment disputes which arose after CIPAA came into force. Mr Monteiro was subscribing to the position taken by KLRCA, as reflected in its Circular No 01 of 2014, which will be discussed later.

[39] Learned counsel added that CIPAA could also not have any retrospective effect as it would amount to implying new obligations into existing contracts. He referred to ss 35 and 36 of the CIPAA as just such provisions. This meant that parties' rights or obligations in an existing contract were impaired. Since CIPAA applies prospectively in respect of construction disputes, Mr Monteiro submitted that 'the claims brought by the Consortium under the Adjudication proceeding are null and void by reason that the cause of action therein crystallised prior to the enforcement of CIPAA 2012 and the Adjudication proceeding should be set aside and/or aborted in limine'.

Submissions of Capitol Avenue Development Sdn Bhd

[40] Moving on to Mr Mah's submissions and he was submitting on behalf of Capitol Avenue Development Sdn Bhd, learned counsel argued that the 'CIPAA Adjudicator does not have jurisdiction to hear and decide the dispute arising from the Letter of Award dated 13.5.2013 because CIPAA 2012 which came into force on 15.4.2014 does not apply retrospectively to the Letter of Award dated 13.5.2013'.

[41] Like Mr Monteiro, Mr Mah submitted that 'in the absence of express words or necessary implication, a statute is prospective in its application if it affects substantive rights unless the legislature gives it retrospective effect. A statue is considered as affecting substantive rights, if it takes away or impairs a

vested right acquired under existing laws, or creates new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past'. Learned counsel submitted that CIPAA was legislation which was 'silent or where there is insufficient information within the legislation to determine the legislative intent, the interpretation favours the view that such a legislation must not be given a retrospective application'.

[42] He cited one of the latest textbooks on adjudication titled 'Construction Adjudication in Malaysia' co-authored by Lam Wai Loon & Ivan YF Loo (2013) at pp 81–82; and a host of cases, both local and abroad in support; such as *RHB Bank Bhd v Ya' akob bin Mohd Khalib @ Abdul Ghani bin Muhammad* [2008] 1 MLJ 157; *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292; *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36; and *Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2)* [2007] 6 MLJ 260; the House of Lords' decision in *Plewa (executrix of the estate of Jozef Plewa, decd) and Chief Adjudication Officer* [1995] 1 AC 249; and the English Court of Appeal's decision in *Lauri v Renad* [1892] 3 Ch 402; the decisions of the Supreme Court of India in *Shyam Sunder And Others v Ram Kumar And Another* AIR 2001 SC 2472; and *Katikara Chintamani Dora & Ors v Guntreddi Annamnaidu & Ors* AIR 1974 SC 1069; the decision of the Federal Court of Canada in *Incremona-Salerno Marmi Affini Siciliani (ISMAS) snc v Castor (The)* [2001] FCJ No 1821; and finally, the decision of the High Court of Australia in *Kraljevich v Lake View and Star Limited* (1945) 70 CLR 647.

[43] Mr Mah identified the relevant provisions in CIPAA which are said to affect substantive rights; namely ss 28 (read together with s 25), 29, 30, 35 and 36.

[44] The difference between Mr Mah's submissions here is that unlike Mr Monteiro and Mr Mohanasundram, and later as we will see, Mr Lam; is that there cannot be partial or selective retrospective application. As far as Mr Mah is concerned, the Act applies prospectively, be it in respect of the construction contract or the payment dispute. He did not agree that there could or should be a distinction between the construction contract and the payment dispute. He did not see any legal basis for such a reading; and that at best, KLRCA's position is but an opinion with no force of law.

[45] While Mr Mah accepted the principle of purposive interpretation, this does not mean that CIPAA can be applied retrospectively. If, as is disclosed in *Hansard* that Parliament intended the legislation was urgent and passed to provide speedy resolutions of payment disputes, learned counsel submitted it then did not make sense for the Act to have taken another two years to come into force. In any case, it was Mr Mah's submission that the Act could not apply

to the present facts as both the construction contract and the payment dispute in question crystallised well before the Act came into force.

[46] I must add that both Mr Monteiro and Mr Mah were of the view that *Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah* was distinguishable. Both counsel submitted that unlike the Housing Development (Control and Licensing) Act 1966, CIPAA could not be considered as falling within the meaning of 'social legislation' for the court to give a more flexible or liberal interpretation and say that CIPAA has retrospective application.

Submissions of Bauer (M) Sdn Bhd

[47] Moving then to the responses of the respective defendants. For this, I will first set out Mr Sanjay Mohanasundram's submissions. He acts for Bauer (M) Sdn Bhd.

[48] Mr Mohanasundram submitted 'that the principles of statutory interpretation is enshrined in s 17A of the Interpretation Acts 1948 and 1967'; and its proper application can be seen in the Federal Court's decision in *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449. After examining *Hansard* so as to determine Parliament's intention with regard CIPAA, he concluded that the 'purpose of CIPAA is to resolve disputes in relation to payment. This is clear from the reading of the preamble to CIPAA'. CIPAA was intended to facilitate regular and timely payment; to provide a mechanism for speedy dispute resolution and to provide for remedies for recovery of payments. That meant that adjudication relates only to the recovery of monies which contractors say are owing to them; and not to the adjudication of substantive rights under the construction contract. Further, any decision made by the adjudicator in this respect is only temporarily binding and not a final decision of the payment dispute. Finality is brought about either by arbitration or by litigation in the courts. That being so, there are no substantive rights involved.

[49] It was also Mr Mohanasundram's submission that from his reading of s 41 of the CIPAA, 'it is clear that the issue of whether CIPAA being substantive law which came into effect on 15.4.2014 applies retrospectively to construction contracts which were entered into before 15.4.2014 would not have any impact on the application of CIPAA'. This was because 'CIPAA comes alive when there is a dispute on payment. Therefore the date when the construction contract was entered is immaterial on the application of CIPAA. If it is otherwise as alleged by the Plaintiff, it will defeat the purpose of CIPAA'.

[50] In the facts of the second case, the plaintiff had alleged that CIPAA did not apply to the adjudication process here because the payment dispute arose before 15 April 2014. Mr Mohanasundram disagreed. He contended that a payment dispute only arises after the issuance of an interim certificate under cl 30.0 of the underlying contract between the parties; adding that 'Given the Defendant only became aware of Payment Certificate No. 6 on 23.4.2014, this would be the earliest date that the Defendant would have been able to object and dispute this payment on the terms and conditions of the contract'. The alternative date would have been when the superintending officer issued his decision on the rate rationalisation on 30 May 2014. If this alternative date was the correct date, then 'This decision was well after CIPAA came into force'. Hence, it was the submissions of learned counsel for Bauer (M) Bhd that the application was properly lodged.

Submissions of Bisraya Construction Sdn Bhd and MRCB Engineering Sdn Bhd

[51] These were Mr Faisal's submissions. His clients, Bisraya Construction Sdn Bhd and MRCB Engineering Sdn Bhd were of the view that they had a right to refer their dispute with UDA Holdings Bhd to adjudication under CIPAA. He rationalised this right by examining the purpose or what he called the 'evolution and spirit of CIPAA'. That purpose or spirit of CIPAA as determined from the provisions of CIPAA itself as well as *Hansard*, was to 'alleviate payment problems presently prevails (sic) pervasively and which stifles cash flow in the construction industry ... by providing a speedy mechanism for the settlement of these payment issues in construction contracts even if this may be on a provisional interim basis'.

[52] Learned counsel added that although the statutory payment regime under CIPAA was a fairly novel concept in Malaysian jurisprudence, it has been available in other jurisdictions for some time. He then compared CIPAA with the relevant legislationsof several jurisdictions before urging the Court to adopt a purposive approach when construing and answering this issue of whether CIPAA was retrospective in its application. It was Mr Faisal's further submissions that in adopting a purposive approach, the court 'must not entertain technical objections or technical quibbles to defeat the application of CIPAA'. He relied on, inter alia, the following cases for this proposition: *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177; *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807; *Rees v Firth* [2011] NZCA 668; *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) 64 Con LR 1; *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270; *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365 and *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364. All these courts have

consistently demonstrated a purposive approach when dealing with the statutory adjudication process. These courts do so in order that the underlying intent and purpose of the statutory adjudication process, that is, to provide temporary finality, may be met. It was impressed on this court to follow suit.

[53] In his subsequent submissions, learned counsel refined his submissions to say that the principle of interpretation is to interpret procedural legislation retrospectively, which is what CIPAA really is, unless there was express provision to the contrary. For this, he relied on several decisions of the Supreme Court of India which were followed in *Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah*. Learned counsel also urged the court to recognise CIPAA as falling within the category of 'social legislation' as it was 'legislation which seek to assist a group of people with less bargaining power'. This was the approach taken by the Court of Appeal in respect of the Housing Development (Control and Licensing) Act 1966 in the case of *Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd (No 1)* [2009] 5 MLJ 381; [2011] 4 CLJ 42; and the Federal Court's decision in *Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah*; as well as the attitude of several decisions abroad.

[54] On the matter of substantive rights, Mr Faisal was of the view that CIPAA did not affect substantive rights; but if it did, it was necessary so that the purposive intention of Parliament in this respect may be carried into effect. He painstakingly examined each of the provisions identified by the plaintiff to show how the entire operation of the Act will be defeated if the arguments of the plaintiff gained footage with the court. According to learned counsel, ss 28, 29 and 30 are provisions which only come into operation after an adjudication decision has been rendered and there is the matter of enforcement of that adjudication decision. When seen in that light, there was no question of any retrospectivity to begin with. As for ss 13 and 37, learned counsel submitted that these provisions merely provide for the temporary binding nature of adjudication; and the benefit of adjudication as an interim forum prior to or concurrently with an arbitration or court proceeding. As such, 'the principle against doubtful penalisation obviously does not apply'. As for ss 35 and 36, s 36 provided for default arrangements in the absence of any terms providing for payment under a construction contract. Again, such a provision is procedural in nature to allow parties to bring a claim under CIPAA.

[55] On the position with s 35, Mr Faisal submitted that although the wording appears to affect substantive rights of the parties, in the context of CIPAA and its application, it was 'necessary as it takes away a defence that may be raised against meeting payment obligation'. He submitted that 'the conditional payment defence, if allowed, would defeat the entire operation of

the Act'. Learned counsel added that because of the declaratory nature of the provision, the Act can nevertheless act retrospectively as was pronounced by the Supreme Court of India in *Mithilesh Kumari & Anr v Prem Behari Khare* AIR 1989 SC 1247.

[56] The only exception to this retrospective operation of CIPAA is where the payment dispute has already been referred to arbitration or to court and the proceedings are pending. Such pending proceedings are saved under s 41 of the CIPAA.

[57] Mr Faisal suggested that given the object and intention of Parliament, 'which is to introduce an affordable, swift and fresh forum for the adjudication of payment disputes', these factors must 'weigh in favour of CIPAA 2012 to be applied retrospectively'. If, however, the court was of the view that s 35 'gravely' affects the rights of parties that it could not have been the intention of Parliament for that to happen, learned counsel suggested then that the court 'construe section 35 alone shall have prospective application leaving the rest of the provisions of CIPAA 2012 to apply retrospectively'.

Submissions of KLRCA

[58] Mr Lam submitted that there were three possible interpretations to the application of CIPAA:

(a) first, that CIPAA applies prospectively in the sense that it applies only to construction contracts made on or after the operation date of the Act;

(b) second, that CIPAA applies retrospectively in the sense that it applies to all payment disputes whether or not it arose on or before or after the operation date of the Act, provided that no court or litigation proceeding had been commenced in respect of the payment dispute prior to the operation date of the Act; and

(c) third, that CIPAA applies to a payment dispute under a construction contract which arose on or after (and not before) the operation date of the Act, regardless of whether the relevant construction contract was made before, on or after the operation date.

[59] KLRCA urged the court to adopt the third interpretation. Its rationale is substantially moulded by its reading of s 41 of the CIPAA.

[60] To start off, KLRCA argued for a prospective interpretation. Mr Lam submitted that the first place to start was to bear in mind the 'fundamental rule of the common law regulating the interpretation of statute ... succinctly restated by Lord Brightman in the Privy Council decision in the case of *Yew*

Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1; [1983] CLJ (Rep) 56', that '... there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used ...'. A

[61] This rule has been consistently followed by the courts as is reflected in the recent Federal Court's decision in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749. Next, learned counsel considered the Court of Appeal's decision in *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292; [1995] 1 CLJ 491 where the Court of Appeal held that the correct test to be applied to determine whether a written law is prospective or retrospective is to '... first ascertain whether it would affect substantive rights if applied retrospectively. If it would then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights'. B C D

[62] Guided by these principles, learned counsel submitted that it was first necessary to ascertain whether CIPAA affects substantive rights if applied retrospectively or, is it purely procedural. If it affects substantive rights, and hence prima facie to be construed as prospective, then the next step was to proceed to ascertain whether the language used plainly manifests in express terms or by clear implication a contrary intention. However, if CIPAA is merely procedural, and therefore presumed to be retrospective, it is then necessary to ascertain whether the retrospectivity effect will result in injustice or produce a manifest injustice. If it will, the court will have to determine whether an interpretation can be given that would avoid such injustice result. E F

[63] In answering the issue as to whether CIPAA affects substantive rights if applied retrospectively or, it is an Act which is purely procedural, learned counsel examined the features of the Act before concluding that 'it would appear that the CIPA Act 2012 is procedural in its character'. According to learned counsel, CIPAA provided a summary procedure for a quick resolution of construction payment disputes through statutory adjudication. Although adjudication decisions are only temporarily binding in that it would not affect the right of the contracting parties to seek for final resolution of the dispute through litigation or arbitration (see sub-s 37(1)), those decisions are nevertheless enforceable under the Act. G H

[64] Learned counsel was however, quick to point out that 'these are only some of the characteristics of the CIPA Act 2012'. He submitted that there were also what he termed as 'various interventionistic provisions which purpose was to ensure that the summary procedure works effectively'. The presence of these 'interventionistic provisions' which 'apply hand in hand with the I

procedural provisions under the Act' some of 'which displaced the established common law positions' was the basis upon which learned counsel say that 'substantive rights of the parties' had been affected. These parties had 'previously arranged their contractual affairs' and it would now require 'express terms or by clear implication a contrary intention' before the Act could be said to apply retrospectively. Sections 29, 30, 35 and 36 were identified as falling within what was meant as 'interventionistic provisions'.

[65] Learned counsel submitted that s 41 was a plain manifestation in express terms or clear implication of a contrary intention. This was derived by recognising that a savings provisions narrows 'the effect of the enactment in which it is found so as to preserve some existing legal rule or right, as the case may be, from its operation' as expounded in the Supreme Court's decision in *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1; [1996] 1 CLJ 529.

[66] With this, learned counsel submitted that it could be 'safely concluded that it is implied from the saving provision that what is not 'saved' must necessarily be intended to be caught by the CIPA Act 2012. In other words, the presumption of prospectivity is thereby displaced by the saving provision, except for the particular existing right expressly preserved from the operation of the Act'. The existing right which is preserved by s 41 from the prospective operation of the Act is 'any court or arbitration proceeding' relating to any payment dispute under a construction which had been commenced prior to the operation date.

[67] It was learned counsel's further submission that 'Literally, that meant that section 41 merely says that any court or arbitration proceeding in respect of a payment dispute which had been commenced prior to the operation date of the CIPA Act 2012 would not be affected by the operation of the Act. If that is the case, then the saving provision is nothing more than a mere reinforcement of Section 37(1) of the CIPA Act 2012 which already allows any court or arbitration proceedings in respect of a payment dispute to be commenced or proceeded concurrently with adjudication'. He went on to argue that 'that certainly could not have been the intention of Parliament'. Relying on the Court of Appeal of Brunei's decision in *Zainuddin Dato Seri Paduka Hj Marsal v Pengiran Putera Negara Pengiran Haji Umar bin Pengiran Datu Penghulu Pg Hj Apong & Anor* [1998] 2 MLJ 1 at p 15; [1997] 4 CLJ 233 at p 234 where the court had opined that '... If only one meaning can be given to the provisions under review, the court must disregard any apparent anomaly or seeming absurdity and construe the words in their ordinary sense. But where this is not so, the court will seek to interpret the provisions in a way that does not result in absurdity.', learned counsel suggested that a 'more sensible interpretation should be given to s 41'.

[68] Learned counsel went on to submit that 'Given the ambiguity inherent in the saving provision', he was of 'the view that two possible interpretations may be accorded to section 41 of the Act'; namely a narrow and a wider interpretation. By 'narrow interpretation', it was suggested that 'section 41 was intended to preserve 'any payment dispute' in a construction contract' in respect of which a court or arbitration proceeding had been commenced prior to the operation date. In other words, any payment dispute, whether arose before, on or after the operation date would be caught by the Act unless it had been referred to court or arbitration prior to the operation date. But, if s 41 was intended to preserve any payment dispute under a construction contract which arose prior to the commencement date from the operation of the Act, then in effect, all payment disputes which were crystallised before the operation date would be excluded from the operation of the Act. In this regard, a purposive interpretation is applied. This interpretation is reached on the basis that, by using the word 'proceeding' (as opposed to 'payment dispute'), Parliament must have in their mind that there must first be in existence a payment dispute which led to the commencement of an arbitration or court proceeding in respect thereof, and that therefore, Parliament must have intended that so long as a payment dispute had been crystallised which gives a party the basis to commence arbitration or court proceeding before the operation date, that payment dispute will be 'saved' and will not be caught by the operation of the Act'.

[69] Mr Lam added that 'this interpretation appears to find support from the Supreme Court case of *Lim Phin Khian v Kho Su Ming*. He went on to submit that 'in either interpretation, a construction contract made before the operation date is not preserved from the operation of the Act. This is because s 41, being a saving provision, does not expressly nor by necessary implication preserve this category of construction contracts. This is unlike similar legislation in the United Kingdom, New South Wales, New Zealand and Singapore, which expressly make clear as to their application to construction contracts made after a certain specified date. Hence, it can be reasonably concluded that Parliament never intended to exclude construction contracts made before the commencement date from the operation of the Act'.

[70] Mr Lam urged the court to adopt the wider interpretation to limit the effect of the retrospectivity for several reasons. Amongst those reasons was the fact that CIPAA affects substantive rights; that as per Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 AC 486, it was a matter of 'fairness' and ensuring that no injustice results. Although Parliament had used the word 'proceeding' in s 41, Parliament must have in mind that there must first be in existence a payment dispute which gave rise to the commencement of an arbitration or court proceeding in respect thereof, and that therefore, Parliament must have

intended that so long as a payment dispute had been crystallised which gives a party the basis to commence arbitration or court proceeding before the operation date, that payment dispute will be 'saved' and will not be caught by the operation of the Act'.

[71] On the matter of the Federal Court's decision in *Westcourt Corp Sdn Bhd*, learned counsel submitted that while CIPAA may be procedural in character, it nevertheless affected substantive rights; which did not happen in *Westcourt Corp Sdn Bhd*. The Explanatory Statement to the Bill introducing CIPAA indicates that the Act was more than legislation introduced for facilitating regular and timely payments and providing for speedy resolution of payment disputes. The Act was also to alleviate payment problems as well as provide for default payment terms and remedies for recovery; in which case, it cannot be said that the Act was merely procedural in nature.

Determination of the court

[72] In dealing with the issue as to whether CIPAA is retrospective or prospective in its application; it is necessary first and foremost to understand what CIPAA is all about. Learned counsel have all started by asking whether substantive rights have been infringed; and that because substantive or vested rights are said to have been affected, CIPAA cannot therefore be read to apply retrospectively; unless, of course, there is express provision to say otherwise. From the submissions made, it can also be seen that different positions have been assumed depending on whether the issue is addressed from the perspective of the construction contract; or the payment dispute. Whether it is necessary or even appropriate to make that distinction at all in the first place will be considered.

The provisions of the CIPAA

[73] There are seven parts in this Act containing some 41 provisions. Part I contains preliminary provisions dealing with matters such as short title and commencement; application, non-application and interpretation. Part II of the Act deals with the whole adjudication of payment disputes while Part III deals with matters related to the adjudicator; Part IV on the enforcement of adjudication decision, Part V on the adjudication authority; Part VI deals with general matters and the last Part, Part VII deals with Miscellaneous matters.

[74] As stated in the long title of the Act, CIPAA is an 'Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters'.

Although s 4 defines terms such as 'adjudication decision', 'adjudication proceedings' and 'adjudicator', it does not define 'adjudication'. A

[75] In a paper entitled 'HGCRA; Re-Addressing the Balance of Power between Main Contractors and Subcontractors' written by Paul Robert Lynch and reported in the *Nationwide Academy for Dispute Resolution (UK) 2011*, this aspect was observed by the writer in respect of the English Housing Grants, Construction and Regeneration Act 1996. In fact, this observation holds true of any adjudication regime under any of the jurisdictions that have a statutory framework for the regime. The fact that the term 'adjudication' is not defined is quite logical; it is but a summary and interim process of determining differences by some unrelated third person or party called an 'adjudicator'. That adjudicator's decision is binding on the disputing parties until final settlement, either by arbitration or by the court. B C

[76] In other jurisdictions, adjudication is not unique to the construction industry. In the United Kingdom, adjudication is part of the statutory fabric of the Asylum and Immigration Appeals Act 1993 and the Social Security Act. Within the construction industry, however, especially international projects contracts such as FIDIC, adjudication is a mandatory first level dispute resolution process undertaken long before arbitration is even contemplated. D E

[77] Putting aside the matter of the application and non-application of the Act found in Part I for later, a consideration of Part II will show that it deals with the whole process of adjudication of payment disputes; from its initiation to its culmination in an adjudication decision. The whole process is methodical with fairly clear signposts mapping out each step of the procedure or process leading up to the adjudication decision. Absent of this process, arguably there will be no payment dispute capable of being referred to adjudication; or valid adjudication decision. F G

[78] Time periods are specifically worked into each step. No longer is it measured by weeks or months but by days; and even then, the number of days allotted for each step is generally between five to ten working days. There are even time limits or time frames within which the adjudicator must decide the dispute and deliver the adjudication decision (under sub-s 12(2), the adjudicator has forty five working days to decide and render his decision on the dispute). As we will soon see, there are sound reasons for such provisions. H

[79] Coming back to Part II, it deals, inter alia, with how a payment dispute arises, evolves or exists; what parties are supposed to do when they have a claim; how the payment dispute is processed and later adjudicated. It further deals with theeffect of adjudication decisions including confidentiality issues related to the adjudication. Procedural matters such as consolidation of adjudication I

proceedings, stay, withdrawal and recommencement of adjudication proceedings, costs, the adjudicator's fees and expenses are also provided for.

[80] This is how the whole adjudication process starts. It starts with a payment claim. Under s 5, a party who claims to be an 'unpaid party' may serve a payment claim on a non-paying party pursuant to a construction contract. Subsection 5(2) provides for the mandatory contents of the payment claim. It must be in writing and it must include the following:

(a) the amount claimed and due date for payment of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.

[81] When served, a non-paying party responds to the payment claim by way of a written 'payment response'. That 'payment response' sets out either the admission or dispute of the amount claim, whether in respect of the whole or part of the payment claim. Where there is admission, the relevant amount is expected to be sent along with the payment response. Where there is dispute, the reasons for the dispute are required. There is a time period for the payment response (ten working days of the receipt of the payment claim); and a deeming provision where a non-paying party fails to respond to the payment claim. In such a case, that party is deemed to have disputed the entire payment claim (sub-s 6(4)).

[82] Upon receipt of the payment response disputing the payment claim, the unpaid party has the option under sub-s 7(1) of referring the dispute from the payment claim to adjudication. Where adjudication is initiated, sub-s 8(1) requires the unpaid party, now known as the 'claimant' to serve a written notice of adjudication containing the nature and description of the dispute and the remedy sought together with any supporting document on the non-paying party, now known as the 'respondent'.

[83] Thereafter, an adjudicator will be appointed following the provisions set out under s 21. Once an adjudicator has been appointed, a formal written 'adjudication claim' must be served on the respondent, with a copy of course, extended to the adjudicator. The respondent then responds in writing through a written 'adjudication response', similarly extending a copy to the adjudicator. The claimant has an opportunity to respond to that 'adjudication response' by filing what is known as an 'adjudication reply'.

[84] The appointment and matters related to the jurisdiction, powers, duties and obligations of the adjudicator are set out in Part III. An adjudicator may be appointed by the parties themselves; or by the Director of KLRCA.KLRCA is the 'adjudication authority' and under Part V, it has, inter alia, the responsibility of setting competency standards and criteria of adjudicators; determination of the standard terms of appointment of an adjudicator and fees for the adjudicator's services; providing administrative support for the conduct of adjudications under CIPAA; and any functions that 'may be required for the efficient conduct of adjudication under this Act'.

[85] Then, there are the provisions of CIPAA which deal with enforcement of adjudication decisions, general and miscellaneous matters (Parts IV, VI and VII respectively). It is ss 29 and 30 found in Part IV, and ss 35 and 36 found in Part VI which are of great concern to the plaintiff and KLRCA. Section 29 allows a party to suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services of any construction contract where the adjudicated amount has not been wholly paid or has only been partly paid. Section 30 allows for direct payment from the principal of the party against whom an adjudication decision is made and who has failed to make payment of the adjudicated amount.

[86] Next, is s 35. That section prohibits any conditional payment provisions in construction contracts. Such provisions are void. 'Conditional payment' has a limited meaning. Subsection 35(2) provides:

> 35(2) For the purposes of this section, it is a conditional payment provision where–
>
> (a) the obligation of one party to make payment is conditional upon that party having received payment from a third party; or
>
> (b) the obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.

[87] I shall deal with these concerns later. Finally, there is s 36 containing the default provisions to be read into construction contracts. These default provisions apply where the parties have not provided for any terms on progress payments. Where the parties have 'otherwise agreed', then, subject to other provisions of CIPAA, those agreed terms will prevail.

[88] Coming back to how the adjudication starts, it is observed that although the term 'payment claim' is not defined in s 4, many of the other terms used in the Act in fact, are. It is important to note what meanings these statutory definitions carry; even more important and of greater significance is that these definitions found in s 4 of the Act are unusually definitive and exhaustive in their defines as opposed to the practice of drafting general or non-exhaustive definitions. Of significance are the following definitions:

'payment' means a payment for work done or services rendered under the express terms of a construction contract;

'construction contract' means a construction work contract or construction consultancy contract;

'construction work contract' means a contract to carry out construction work;

'construction consultancy contract' means a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services;

'non-paying party' means a party against whom a payment claim is made pursuant to a construction contract;

'unpaid party' means a party who claims payment of a sum which has not been paid in whole or in part under a construction contract;

[89] This definitive, exclusive as opposed to inclusive, and exhaustive style of defining and interpreting terms found in this Act must not be overlooked. It is the view of the court that this clues one in to some considerable degree as to the operation and intention of the Act. From these definitions and the provisions within which they appear, it may be deduced that the terms have a particular and peculiar but limited meaning and understanding. That these meanings operate within the confines of the Act and no other. To illustrate is the definition of the term 'construction contract' means a contract to carry out construction work while the term 'construction work' means:

the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of-

(a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

(b) any road, harbour works, railway, cableway, canal or aerodrome;

(c) any drainage, irrigation or river control work;

(d) any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or

(e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work,

and includes:

(A) any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and

(B) procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e).

[90] Outside of the parameters of these definitions, the Act will not apply. Another example would be sub-s 35(2) which provides for the meaning of conditional payment and even there, the meaning is 'For the purposes of this section'. Although the Act contains liberal provisions on construction contracts, it does not purport to govern every aspect of these contracts. The Act actually only deals with a veryspecific and narrow aspect of construction contracts, and that is the payment aspect.

Parliament's intention

[91] Having examined the broad framework of CIPAA and seeing how it works, the burning question surely is, why has Parliament seen it fit to enact such an elaborate piece of legislation for just this aspect of the construction industry? From the submissions made, it would be fair to say that each learned counsel before the court is in general agreement as to the purpose of the Act; and what Parliament's intentions are in this regard. Each of them has either examined the Act, *Hansard*; and the Explanatory Statement of the relevant Bill, just to name a few, for answers to the purpose and intent of CIPAA.

[92] As stated in the long title of the Act, CIPAA is an 'Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters'. Each of these objectives relate to or is connected with payment; be it to facilitate regular and timely payment;provide speedy dispute resolution through adjudication which we have seen is also about payment; or to provide remedies for the recovery of payment in the construction industry. This long title of the Act confirms and reaffirms the observation that the court had earlier made, that the Act is, in essence and in reality legislation dealing with a very niche aspect of the construction industry. It only deals with payment which generally arise in the course of executing the relevant works or as the works progress; and how to secure that payment. Even the last general objective which is frequently seen in long titles; that the Act provides for 'connected and incidental matters' must necessarily be understood to refer to the earlier intent or objectives that relate to payment.

[93] This perhaps explains why for some jurisdictions such as Australia (all states save for Western Australia); and Singapore, the short titles of their relevant law specifically refer to the matter of payment. Those laws are the Building and Construction Industry Security of Payment Act 1999 of New South Wales; Building and Construction Industry Security of Payment Act 2002 (Victoria); Building and Construction Industry Security of Payment Act 2004 (Queensland); Construction Contracts (Security of Payments) Act 2004 (Northern Territory); Building and Construction Industry (Security of

Payment) Act 2009 (Australian Capital Territory); Building and Construction Industry Security of Payment Act 2009 (South Australia); Building and Construction Industry Security of Payment Act 2009 (Tasmania); and Building and Construction Industry Security of Payment Act 2004 (Chapter 30B) of Singapore.

[94] The exceptions being the Housing Grants, Construction and Regeneration Act 1996 of the United Kingdom; and the Construction Contracts Act 2002 of New Zealand. Each of these laws have clearly flagged their law as one related to payment; and that it is about security of that payment in the construction industry. It is the court's view that CIPAA is no different. Although the short title of the Act does not talk about security of payment, it is nevertheless about payment.

[95] Moving next to the Parliament debates recorded in *Hansard*, much insight can be gained from the Deputy Minister's speech at the Second Reading of the Bill to introduce CIPAA both at Dewan Rakyat on 2 April 2012 and at Dewan Negara on 7 May 2012. Excerpts of the speech at the Lower House can be found at exh 'B1' of the defendants' affidavit-in-reply in the second case and it is useful to set the same out:

> Tuan Yang di-Pertua, industri pembinaan merupakan pemacu penting pertumbuhan ekonomi Negara. Dalam tempoh Rancangan Malaysia Kelapan, sektor pembinaan berkembang sebanyak 1% setahun dan menyumbang 3.7% kepada Keluaran Dalam Negara Kasar (KDNK). Bagi tempoh Rancangan Malaysia Kesembilan pula, sektor pembinaan telah berkembang sebanyak 4.4% setahun dan menyumbang 3.2% kepada KDNK. Bagi tempoh Rancangan Malaysia Kesepuluh, pertumbuhan dijangka berkembang sebanyak 3.7% setahun dan menyumbang sebanyak 3.1% kepada KDNK. Jangkaan pertumbuhan ini adalah selaras dengan matlamat Program Transformasi Ekonomi dan matlamat untuk menjadi Negara maju dan berpendapatan tinggi menjelang 2020. Selain daripada itu, industri pembinaan turut menjana kesan berganda melalui penglibatan pelbagai pihak dalam rantaian pelaksanaaan projek-projek pembinaan seperti pembuatan dan pembekal bahan-bahan binaan, sewaan peralatan dan jentera, penawaran buruh dan perkhidmatan-perkhidmatan lain.
>
> Tuan Yang di-Pertua, masalah pembayaran dalam sektor pembinaan yang dihadapi oleh mana-mana pihak dalam rantaian pembinaan termasuk kontraktor utama, sub kontraktor, sub-sub kontraktor, para perunding dan pembekal-pembekal bahan binaan boleh menyebabkan aliran tunai terjejas. Aliran tunai yang terjejas akan menyebabkan kelewatan menyiapkan projek kemerosotan kualiti kerja, meningkatkan kos dan dalam kes-kes kritikal kontrak akan ditamatkan. Ini akan memberikan imej negatif kepada industri pembinaan. Melalui Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 satu mekanisme bagi menyelesaikan pertikaian secara mudah, cepat dan murah melalui proses adjudikasi telah diwujudkan.

Buat masa ini mekanisme yang diguna pakai bagi menyelesaikan pertikaian pembayaran adalah melalui tindakan mahkamah dan prosiding timbang tara. Walau bagaimanapun, proses perbicaraan kes di mahkamah lazimnya mengambil masa yang lama manakala prosiding timbang tara melibatkan kos yang tinggi. Prosiding timbang tara hanya boleh dimulakan dengan persetujuan pihak-pihak terlibat. Pada lazimnya perjanjian bertulis akan memperuntukkan bahawa timbang tara boleh dimulakan selepas kerja pembinaan siap atau kontrak ditamatkan. Tempoh masa yang lama dan kos prosiding yang tinggi adalah faktor utama yang mengekang kepada pihak-pihak terlibat untuk merujuk pertikaian kepada mahkamah dan timbang tara.

Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 memberi satu opsyen kepada pihak-pihak terlibat menyelesaikan pertikaian dengan kos yang rendah dan cepat. Oleh yang demikian Jemaah Menteri dalam mesyuaratnya pada 15 Julai 2009 telah bersetuju agar suatu akta khusus digubal bagi menangi isu pembayaran dan membantu pihak-pihak dalam industri pembinaan untuk menyelesaikan pertikaian pembayaran. Susulan daripada itu Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 telah diwujudkan oleh Kementerian Kerja Raya selepas mengadakan beberapa siri perbincangan dan dialog bersama agensi pekerjaan, penggiat industri, pihak-pihak berkepentingan, stakeholders dan badan profesional yang berkaitan.

...

...

Pertikaian yang boleh dirujuk kepada adjudikasi adalah berkaitan dengan pembayaran bagi kerja siap atau perkhidmatan yang dibekalkan yang sepatutnya dibayar di bawah terma-termanya atau kontrak dalam kontrak pembinaan. Ia termasuklah bayaran interim mengikut kemajuan kerja. Prosiding adjudikasi boleh dimulakan sebaik sahaja timbul pertikaian pembayaran sama ada semasa projek pembinaan sedang dijalankan atau selepas projek disiapkan. Melalui peruntukan Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 proses adjudikasi mengambil masa tidak melebihi 75 hari iaitu mulai dari tarikh notis adjudikasi diserahkan oleh pihak yang menuntut kepada pihak yang dituntut sehingganya keputusan *adjudicator*.

Tempoh ini adalah lebih singkat berbanding tempoh prosiding timbang tara dalam mahkamah. Berdasarkan perbandingan yang telah dibuat di atas undang-undang adjudikasi di negara-negara lain seperti Singapura, Australia dan New Zealand, tempoh yang telah ditetapkan ini adalah munasabah.

Tuan Yang di-Pertua, adjudikasi tidak menafikan hak pihak-pihak yang terlibat untuk merujuk pertikaian kepada timbang tara atau mahkamah. Pertikaian berhubung pembayaran boleh dirujuk secara serentak kepada adjudikasi timbang tara dan mahkamah. Walau bagaimanapun, keputusan yang diperoleh dalam prosiding adjudikasi akan mengikat pihak-pihak yang terlibat melainkan pertikaian tersebut dimuktamadkan oleh prosiding timbang tara atau mahkamah.

Pihak-pihak yang terlibat dalam pertikaian adalah bebas untuk melantik mana-mana adjudikator. Adjudikator boleh dilantik dari kalangan pihak-pihak dalam industri pembinaan. Mereka juga boleh terdiri daripada peguam dan yang berpengetahuan mengenai bidang pembinaan. Walau bagaimanapun, sekiranya

adjudikator tidak dipersetujui, maka pelantikan adjudikator hendaklah dibuat oleh Kuala Lumpur Regional Center of Arbitration (KLRCA) yang merupakan sebuah institusi sedia wujud dan dikawal selia oleh Menteri yang bertanggungjawab bagi hal ehwal undang-undang.

Bagi memastikan pengendalian dan pelaksanaan adjudikasi yang berkesan, Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 memperuntukkan bahawa KLRCA dilantik sebagai pihak berkuasa adjudikasi. KLRCA bertanggungjawab untuk meletakkan piawaian, kewibawaan, kriteria adjudikator, terma dan syarat lantikan serta fi perkhidmatan adjudikator. Melalui Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011, KLRCA dalam melaksanakan tugas-tugas sebagai pihak berkuasa adjudikasi hendaklah mendapatkan arahan dasar daripada Menteri yang bertanggungjawab mengenai hal ehwal undang-undang yang akan berunding terlebih dahulu dengan Menteri Kerja Raya.

Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 memperuntukkan berapa remedi bagi mendapatkan bayaran selaras dengan keputusan adjudikator. Antara remedi yang diperuntukkan adalah hak menggantung pelaksanaan atau mengurangkan kadar pemajuan pelaksanaan mana-mana kerja pembinaan atau perkhidmatan perundingan pembinaan jika amaun mengikut keputusan adjudikasi tidak dibayar sepenuhnya mengikut masa yang ditetapkan oleh adjudikator.

Di bawah Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011, pihak yang menjalankan hak menggantung pelaksanaan atau mengurangkan kadar kemajuan pelaksanaan tidak boleh disifatkan sebagai melanggar kontrak malah berhak untuk mendapat lanjutan masa yang munasabah untuk menyiapkan kerjanya. Keputusan adjudikasi juga boleh dikuatkuasakan seolah-olah keputusan adjudikasi ini adalah penghakiman atau perintah mahkamah tinggi. Di bawah Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011, Menteri Kerja Raya boleh melalui perintah dalam warta mengecualikan mana-mana pihak atau mana-mana kontrak daripada kesemua atau mana-mana peruntukkan akta.

[96] This is part of the same Deputy Minister's speech delivered at the Senate when tabling the Bill:

Tuan Yang di-Pertua, industri pembinaan menyumbang kira-kira RM7 bilion setahun atau antara 3 peratus hingga 4 peratus kepada Keluaran Dalam Negara Kasar (KDNK) dan menyediakan hampir 800,000 peluang pekerjaan. Ia juga menyokong sektor ekonomi lain seperti pengangkutan, pembuatan, kewangan, kesihatan dan pendidikan dengan menyediakan bangunan-bangunan dan infrastruktur fizikal. Industri pembinaan turut menjana kesan berganda melalui penglibatan pelbagai pihak dalam rantaian pelaksanaan projek-projek pembinaan seperti perkhidmatan perundingan, pembuatan dan pembekalan bahan binaan, sewaan peralatan dan jentera, penawaran buruh dan perkhidmatan-perkhidmatan lain. Kementerian Kewangan mengunjurkan bahawa sektor pembinaan dijangka berkembang sebanyak 7 peratus pada tahun 2012.

> Justeru, inisiatif pelaksanaan undang-undang berkaitan dengan pembayaran adjudikasi ini merupakan satu daripada agenda transformasi kerajaan bagi merealisasikan aspirasi tersebut. Dengan adanya Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011, masalah pembayaran dalam sektor pembinaan yang meliputi masalah ketidakbayaran, kelewatan pembayaran dan ketidakcukupan pembayaran dapat ditangani. Tidak dapat dinafikan juga bahawa ia menyediakan ruang bagi menyelesaikan masalah berkaitan pembayaran di pihak kontraktor khususnya kontraktor-kontraktor kecil.
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> ...
>
> Usaha-usaha proaktif kerajaan ini secara tidak langsung akan meningkatkan lagi imej serta kredibiliti industri pembinaan Negara di peringkat global ...

[97] As can be observed, the Deputy Minister acknowledged the construction industry's significant contributions to the national economy as well as the pivotal role that the industry plays in ensuring that the nation reaches developed nation status by 2020 when introducing the Bill before both Houses of Parliament. He also acknowledged that the construction industry which is projected to grow in the coming years supports many other sectors of the economy such as the transportation, financial, health, education by providing the buildings and physical infrastructures required by these industries. The Deputy Minister also acknowledged that in executing these construction projects, the construction industry engages extensively with those involved inproviding necessary services, raw materials, equipment and labour.

[98] According to the Deputy Minister, the construction industry however, experiences problems over payments; either there is non-payment, late payment or insufficient payment. All this cause cash flow problems which in turn lead to delays in the completion of projects, compromise in the quality of works, and in cases of critical contracts result in atermination of those contracts. Ultimately, the construction industry gets a negative image.

[99] After taking stock of all these concerns, discussions and dialogues were conducted with the various stakeholders. CIPAA was conceived from those efforts. Through CIPAA, adjudication was to be offered as a simple, fast and cheap mechanism for resolving these payment problems or payment disputes faced by the construction industry as opposed to the existing resolution through arbitration or the courts; these two options being either time consuming or costly. Adjudication isan additional option; additional as the existing options may be concurrently invoked.

[100] From his opening words to his concluding remarks, the recurring refrain or theme of the Deputy Minister's speech is all about cash flow problems in the construction chain. It is quite apparent that CIPAA was introduced to remedy an existing problem that had plagued and continues to plague the

construction industry. That problem is not just any problem but that related to payments. Parliament was convinced that this proactive measure would indirectly raise the image and credibility of the nation's construction industry at the global level. All this must be properly and fully appreciated before embarking on the determination of the issue of the application and operation of CIPAA.

Experiences of other jurisdictions

[101] It must also be borne in mind that in drafting the relevant Bill, the experiences of several jurisdictions were studied and considered. Those jurisdictions being Singapore, Australia and New Zealand. It is the view of this court that aside from those jurisdictions, the experience of the United Kingdom should also be considered since that was the first jurisdiction to introduce what is described as 'a statutory summary mechanism' of settling payment disputes in construction contracts; the other jurisdictions adopted and adapted the English experience.

[102] In the United Kingdom, the Housing Grants, Construction and Regeneration Act 1996 (Chapter 53) ('HGCRA') which came into force with effect from 24 July 1996 was introduced upon the recommendation of the Commission set up by the House of Commons on 5 July 1993 to undertake a 'joint review of procurement and contractual arrangements in the United Kingdom construction industry'. In its final report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry entitled 'Constructing the Team', more commonly known as the 'Latham Report' published in 1994, Sir Michael Latham who led the Commission made 30 principal recommendations. These recommendations covered a broad range of matters including the existing issues concerning the efficiency of the construction process, construction work quality, construction procurement and the allocation of risks. At Chapter Nine on dispute resolution, the Commission made these observations:

> 9.1 'During the past 50 years much of the United States construction environment has been degraded from one of a positive relationship between all members of the project team to a contest consumed in fault finding and defensiveness which results in litigation. The industry has become extremely adversarial and we are paying the price ... If the construction industry is to become less adversarial, we must reexamine the construction process, particularly the relationship between contractor/subcontractor. A positive alliance of these parties constitutes an indispensable link to a successful project ... Disputes will continue as long as people fail to trust one another.' (Newsletter from 'The dispute Avoidance and Resolution Task Force', (Dart), Washington DC, February 1994.)
>
> 9.2 The UK construction industry is not alone in having adversarial

attitudes. But the United States has taken positive steps to try to reduce them, with the growth of Alternative Dispute Resolution (ADR). The debate over adjudication, conciliation/mediation and arbitration has been very strong throughout this Review. There has been growing consensus over the action needed.

9.3 The best solution is to avoid disputes. If procedures relating to procurement and tendering are improved, the causes of conflict will be reduced. If a contract document is adopted which places the emphasis on teamwork and partnership to solve problems that is another major step. The prepricing of variations is also important.

Adjudication

9.4 Nevertheless disputes may arise, despite everyone's best efforts to avoid them. A contract form with a built in adjudication process provides a clear route. If a dispute cannot be resolved first by the parties themselves in good faith, it is referred to the adjudicator for decision. Such a system must become the key to settling disputes in the construction industry ...

[103] Consequently, recommendation No 26 stated that 'adjudication should be the normal method of dispute resolution'. This recommendation was adopted and carried in HGCRA.

[104] It has frequently been said that the cornerstone of the Housing Grants, Construction and Regeneration Act 1996 'was to introduce a quick mechanism for resolving disputes under constructions contracts at an intermediate stage without waiting for the slower and expensive traditional process of resolving construction disputes through litigation or arbitration which had been seen as stifling cash flow in the construction industry'. This aspect of adjudication is both critical and important because while most standard form contracts provide for interim, progress or stage payments, the completion of the whole project or works is usually a condition precedent to payment. HGCRA altered that by providing for a statutory right to interim payments without waiting for the completion of the whole works. This right was very much welcomed in the construction industry because the reality on the ground was that both main and subcontractors depended on interim payments as their lifelines and for cash flows, both sustainable and sustained. As we shall soon see, this was acknowledged by the courts in the United Kingdom.

[105] Four countries followed in the footsteps in United Kingdom by implementing a similar system of statutory adjudication to deal with payment disputes in construction contracts; namely Singapore, Australia and New Zealand. Malaysia is the latest country to subscribe to statutory adjudication.

[106] The HGCRA is an Act that deals with more than adjudication. It is an Act which provides grants and other assistance for housing purposes; action in relation to unfit housing; amends the law relating to construction contracts and architects; provides grants and other assistance for regeneration and development and in connection with clearance areas; amends provisions relating to home energy efficiency schemes; provides in connection with the dissolution of urban development corporations, housing action trusts and the commission for the new towns; and for connected purposes.

[107] Part II of the HGCRA specifically deals with 'Construction Contracts'; and it can be readily seen that the law hitherto governed by general common law principles is now regulated. After defining and setting the limits of its operation, at s 108, it begins to provide for the right of parties in construction contracts to refer their dispute arising under a construction contract for adjudication. Towards that end, the contract needs to provide for the whole idea of adjudication; what it means, how it is to work, its effect; and what happens when there are no such provisions. Where there are no provisions, the HGCRA intends that a scheme for construction contracts established under the Act is to apply.

[108] As far as the operation of HGCRA is concerned, s 104(6) specifically provides that Part II, where the adjudication process is, 'applies only to construction contracts which are (a) entered into after the commencement of this Part; and (b) relate to the carrying out of construction operations in England, Wales and Scotland'.

[109] How Part II and adjudication is intended to operate may be clued from the remarks of the Construction Minister Nick Raynsford when he was signing the Orders bringing into effect Part II of the Act. He stated:

> The legislation gives a right to fast and effective adjudication; it *will make payment provisions more certain, and it will outlaw most* pay-when-paid clauses. Together these measures will reduce the time and effort spent on disputes and allows the industry to concentrate on what it does best – producing quality buildings and infrastructure. I am certain that, if used sensibly, the legislation will be a huge benefit to the industry and its clients. (Emphasis added.)

[110] These objectives and intention of the UK Parliament on statutory adjudication has been recognised by the English Courts as illustrated in the cases of *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) 64 Con LR 1; *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270; and *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2004] 1 All ER 818.

[111] In *Macob Civil Engineering Ltd v Morrison Construction Ltd*, Dyson J (as

he then was) observed that the court was in that case, considering the adjudication provisions for the first time. On the matter of the intention of Parliament, His Lordship remarked at p 6 that:

> ... The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see s 108(3) of the Act and para 23(2) of Pt 1 of the Scheme. The timetable for adjudications is very tight (see s 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (s 108(2)(e) of the Act and para 12(a) of Pt 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (s 108(2)(f) of the Act and para 13 of Pt 1 of the Scheme). He may, therefore, conduct and entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

[112] In *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270, the English Court of Appeal opined:

> The Housing Grants, Construction and Regeneration Act 1996 (HGCRA) introduced changes of some importance ... It also gave the important and practical right to refer disputes to adjudication so as to provide a quick enforceable interim decision under the rubric of 'pay now, argue later'.

[113] At para 20 of the judgment of the court, Lord Walker added:

> ... No doubt the general purpose of Pt II of HGCRA 1996 is to facilitate and encourage the process of adjudication. But it is intended to be a swift and summary process, as is apparent from the time limits in s 108(2). Parliament evidently decided ... that it was appropriate for an adjudicator to have to deal with the disputes which often arise as to the terms of an oral contract.

[114] In another decision of *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2004] 1 All ER 818 at p 819, May LJ provided some very interesting and oft-forgotten history of how things were before there was adjudication before stating that 'The policy of the legislation is clear' and citing Dyson J's decision in *Macob Civil Engineering Ltd v Morrison Construction Ltd* as set out earlier (described as a 'history lesson' by Hale LJ at p 831). That history bears setting out as it gives background to HGCRA, the practice of progress or stage

payments; and how payment disputes were being handled or treated in the industry:

> [1] It is not just nostalgia to recall the long since discredited decision of this court in *Dawnays Ltd v FG Minter Ltd* [1971] 2 All ER 1389; [1997] 1 WLR 1205. Junior counsel now before the court will probably never have needed to look at it. But it and cases which followed were the talk of the town in some circles in the early 1970s. These were cases in which this court, notably in the judgment of Lord Denning MR, held that architects' certificates under standard forms of building contracts were virtually cash. Cash flow was the very life blood of the enterprise. Under contemporary standard forms of building contract and sub-contract, sums certified and paid to contractors as due to sub-contractors must be paid without deductions for cross-claims or contra-accounts, as they were referred to. Contractors and sub-contractors with the benefit of architects' certificates were enabled to obtain summary judgment for the amount certified without deduction. The *Dawnay*'s case was overruled in the House of Lords in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195; [1974] AC 689. Junior counsel now before the court will have had every cause to consider this case, because it is a leading decision on the law of set-off. It was held that there was no such general principle as appeared to have been laid down in the *Dawnays* case. On the true construction of the sub-contract before the House, there was no provision which ousted the right of common law set-off or abatement. Lord Diplock famously observes [1973] 3 All ER 195 at p 216; [1974] AC 689 at p 718) that 'cash flow' is the lifeblood of the village grocer too, though he may not need so large a transfusion from his customers as the shipbuilder in *Mondel v Steel* (1841) 8 M & W 858; [1835-42] All ER Rep 511 or the sub-contractor in the appeal before the House.
>
> [2] Construction contracts do by their nature generate disputes about payment. If there are delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due. Those who consider and make policy for the building industry, including the government, have taken a general view over the years that a temporary balance should in appropriate circumstances fall in favour of those who claim payment, at the temporary expense if necessary of those who pay. In the years that followed the *Gilbert-Ash* case, standard forms of building contract gradually developed a process of adjudication. If there were disputes as to payment, these could be referred for speedy interim determination to an adjudicator. The adjudicator's decision would be enforceable by summary judgment if necessary. If agreement did not follow for the dispute as a whole, it would be then determined by arbitration or litigation and the eventual final answer implemented.
>
> [3] In July 1993, the government appointed Sir Michael Latham to undertake a review of procurement and contractual arrangements in the United Kingdom construction industry. One of the recommendations in his report Constructing the Team (HMSO, 1994) was that legislation should provide for the speedy resolution of disputes, including disputes as to payment by adjudication, referee or expert. This recommendation resulted in Pt II of the Housing Grants, Construction and Regeneration Act 1996. This provides that every written construction contract has to contain the right to refer disputes to adjudication under a procedure which

> complies with s 108. If the written construction contract itself contains provisions for such a right, those provisions will apply. If and to the extent that it does not, the adjudication provisions of the Scheme for Construction Contracts apply (see s 108(5)). Section 114 provides for the minister to make a Scheme by regulations. Section 114(4) provides that where any provisions of the Scheme apply by virtue of this part of the 1996 Act in default of contractual provisions agreed by the parties, they have effect as implied terms of the contract concerned.

[115] The position in the various states in Australia is no different. For example, the Building and Construction Industry Security of Payment Act 1999 in New South Wales. Section 3 sets out extensively the objects of the Act. It is to ensure that any person who undertakes to carry out construction work under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out or supplying of that work or service. The Act grants such a person a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments. The Act also establishes a procedure for recovery of such progress payments. However, a person is not limited to the remedies under the Act; other entitlements and remedies are preserved and may be pursued.

[116] How the courts have looked at this Act can be gathered from the decision in *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365. While the decision may have been one made in the context of examining the adjudication decision itself as opposed to threshold question of concerning the operation of the Act, the Supreme Court of New South Wales's remarks about the intention of the Legislature in enacting specific law on statutory adjudication is nevertheless useful. In discerning what that intention was, the Supreme Court cited the Minister's speech in the second reading of the Bill; and it shows that the intention of the New South Wales' Legislature is no different from that of their UK counterparts:

> Adjudication therefore provides the claimant with important benefits: a prompt interim decision on a disputed payment, and the amount in the decision must be either paid to the claimant, or secured and set aside. Failure to comply with either of those matters allows the claimant not only to sue for the adjudicated amount, but also to suspend work. Therefore, if the dispute is not resolved to the satisfaction of both parties by the adjudication process, it will result in an independently determined amount being securely set aside until final resolution is achieved ...

[117] In the case of the State of Victoria's Building and Construction Industry Security of Payment Act 1999, the Supreme Court of Victoria also referred to *Hansard* and the Minister's speech made at the Second Reading. This was in the case of *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] 26 VR 112 at p 119:

> The responsible minister stated in the second reading speech (at p 427):

> The main purpose of this bill is to provide for an entitlement to progress payments for persons who carry out building and construction work or who supply related goods and services under construction contracts. This bill represents a major initiative by the government to remove the inequitable practices in the building and construction industry, whereby small contractors are not paid on time, or at all, for their work.

[118] As for New Zealand, the Construction Contracts Act 2002 is an Act to 'reform the law relating to construction contracts'. In particular, it deals with three aspects as can be seen from s 3. First, it is to facilitate regular and timely payments between the parties to a construction contract. Second, it provides for speedy resolution of disputes arising under a construction contract. Third, it provides remedies for the recovery of payments under a construction contract. Section 12 clearly provides that there is no contracting out and that the Act applies despite any provision to the contrary in the agreement or contract. Just as is the position under HGCRA, this Act too, regulates progress payments; that parties are free to work out details of such payments. Those details being details concerning number of progress payments under the contract, intervals between payments, amounts of each payment; and, the date when the payments become due. In the event there are no such provisions, default provisions can be found in the Act – see for example ss 15, 16, 17 and 18. Thereafter, the Act sets about providing for a procedure for adjudication.

[119] Several decisions of the New Zealand courts are of assistance; namely *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177, *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807, and *Rees v Firth* [2012] 1 NZLR 408.

[120] The Court of Appeal of New Zealand in *George Developments Ltd v Canam Construction Ltd* said at p 185 that:

> We are satisfied that the necessary analysis must be undertaken with the purpose in mind. The purpose provision of the Act includes the fact that the Act was 'to facilitate regular and timely payments between the parties to a construction contract'. The importance of such regular and timely payments is well recognised. Lord Denning MR ... said: 'There must be a 'cash flow' in the building trade. It is the very life blood of the enterprise'.

[121] Asher J in the case of *Marsden Villas Ltd v Wooding Construction Ltd*, similarly at p 812 said:

> [14] The effect of the Act was to strongly confirm that such a regime, which protected and encouraged cash flows, was right for cases between principal and contractor. The intention was to improve the head contractor's ability to obtain payment, by setting up a quick and mandatory payment process. In enacting such legislation, the legislature set aside the long-established conservative contractual

approach to construction contracts which emphasises freedom of contract. The history of these cases is described in Hon R Smellie CNZM QC, Progress Payments and Adjudication (2003), Paras 1–15. The Act has 'emphatically vindicated Lord Denning's approach ...

[15] Consistent with the Law Commission paper, the general policy statement which was set out at the beginning of the explanatory note accompanying the Construction Contracts Bill reads as follows:

> This Bill is intended to facilitate prompt and regular payments within the construction industry.

[16] The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain time frame and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed must be made. The substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor's claim. When there is a failure to pay the Act gives the contractor the right to give notice of intention to suspend work, and then if no payment is made, to suspend work. There is also a procedure set up for the adjudication of disputes.

[17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of that procedure, and the quick resolution of disputes. The processes that it sets up are designed to sidestep immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments.

[122] Earlier, His Lordship had also cited the 1999 Law Commission Paper SP3, 'Protecting the Contractors' which was the impetus behind New Zealand's Construction Contracts Act as having stated that the purpose of the legislation was 'the ensuring of prompt cash flow to contractors ...'. That paper had also reported at para 31 that:

> The basis intention is that instead of the cash flow being held up for weeks, months and years, pending a final solution, a decision, described as 'being quick and dirty' will be given to resolve cash flow situation, leaving a final determination of financial rights and obligations to be arrived at later.

[123] The New Zealand Court of Appeal had also considered the intent and application of the Construction Contracts Act 2002 in *Rees v Firth* [2012] 1 NZLR 408 at p 416:

> ... one of the objectives of the CCA was to solve cash flow problems that had been common in the construction industry by facilitating quick payments.

[124] In this decision, the Court of Appeal cited with approval Harrison J's

remarks in *Willis Trust Co Ltd v Green* (CIV-2006-404-809, 25 May 2006):

> [The CCA] was enacted following a series of high profile financial collapses in the construction industry in the 1980s and 1990s, causing substantial and widespread losses. ... [It] was designed to protect a contractor through a mechanism for ensuring the benefit of cashflow for work done on a project, thereby transferring financial risk to the developer. The scheme of the Act is to provide interim or provisional relief while the parties work through other, more formal, dispute resolution procedures.

[125] In Singapore, the Building and Construction Industry Security Payment Act (Chapter 30B) came into force with effect 3 January 2005. It is an Act to facilitate payments for construction work done or for related goods or services supplied in the building and construction industry, and for matters connected therewith.

[126] Like the jurisdictions hitherto discussed, Singapore makes provisions first recognising the right or entitlement to progress payments. Thereafter, the Act makes provisions for the non-payment of such progress payments through the process of adjudication. Section 4(1) provides that 'Subject to subsection (2), this Act shall apply to any contract that is made in writing on or after 1st April 2005, whether or not the contract is expressed to be governed by the law of Singapore'.

[127] The Courts in Singapore have also examined the intent of its Building and Construction Industry of Security of Payment Act (Chapter 30B). In *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364 at p 371, the High Court held:

> 32. The raison d'&ecircumflex;tre of the Act has been similarly clarified by the then Minister of State for National Development, Mr Cedric Foo Chee Keng, at the second reading of the Bill ([29] supra at cols 1119–1120) as follows:
>
> > [B]y upholding the rights of any party in the industry to seek payment for work done or goods supplied, this Bill will help to deter and weed out the practice of delaying or withholding payment without valid reasons. The speedy and low cost adjudication process will expedite the resolution of genuine payment disputes so that cashflow will not be disrupted. It will identify contractors who are facing financial difficulties early, before they cause more problems downstream.
>
> 33. From the above extract, it appears that the Act is primarily directed at safeguarding the continued financial viability of contractors who are victims of payment delays or disputes made in bad faith perpetuated by upstream contracting parties ...

[128] Several other decisions echo this stance. For instance, in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010]

1 SLR 658 at p 678, Judith Prakash J felt the need to repeat the intention of Legislature on the Act. Her Ladyship opined:

> ... The intention of the legislature in enacting this statute was to provide a fast track procedure for an interim decision in respect of a disputed payment claim. The SOP Act sought to assist in maintaining cash flow in the industry while disputes were settled via arbitration or court proceedings. In this respect I refer, as the AR also did, to the speech of the Minister of State for National Development, Mr Cedric Foo Chee Keng, during the Second Reading of the Building and Construction Industry Security of Payment Bill on 16 November 2004 (Singapore Parliamentary Debates, Official Report (16 November 2004) Vol 78 at col 1112), where the Minister explained that the SOP Act:
>
> > will preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. It also facilitates cash flow by establishing a fast and low cost adjudication system to resolve payment disputes. Affected parties will have the right to suspend work or withhold the supply of goods and services, if the adjudicated amount is not paid in full or not paid at all.
>
> Any decision made by the adjudicator in the interim proceeding can, if determined to be wrong after a full investigation of the facts, be set aside by the arbitrator or the court. The essence of the adjudication procedure is speed rather that the essential correctness of the decision ...

[129] Again, in *RN & Associates Pte Ltd v TPX Builders Pte Ltd* [2013] 1 SLR 848 at p 863, the High Court of Singapore chose an approach in dealing with the challenge of an adjudicator's decision by applying a reading which best accord with the intention and purpose of Singapore's Legislature in enacting a specific law on statutory adjudication:

> Given that the adjudicator's jurisdiction was only over a payment claim dispute, the relevant question was not whether they had been a valid payment claim, but whether there had been a payment claim which resulted in a payment claim dispute. The validity of the payment claim may be a ground for the respondent to refuse the payment claim pursuant to s 10 of the SOP Act, and to ask for the payment claim to be re-issued in the relevant format, but a payment claim dispute may still arise from an invalid payment claim. Any determination of validity would hence fall within the adjudicator's jurisdiction.
>
> I found that this approach best accords with the purpose of the Legislature. As I have opined in *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR(R) 522 (at [43]) and which was not the subject of that appeal:
>
> > To conclude, the modern approach in Singapore as well as in England, Australia and Canada is to treat the question as one statutory construction to be answered by looking at the whole scheme and purpose of the Act ([1] supra) and by weighing the importance of the particular requirement in the context of that purpose and asking whether the Legislature would have intended the consequences of a strict construction, having regard to the prejudice to private rights and the claims of the public interest (if any).

> The SOP Act was introduced to provide a faster and less costly way of allowing subcontractors to get paid (see [28] above) and to 'weed out the practice of delaying or withholding payment without valid reasons' (see the Parliamentary Report at col 1119). I found that the Legislature could not have intended for the jurisdiction of the adjudicator to be ousted where the main contractor was relying on his own delay and withholding of payment to dispute the validity of a payment claim.

[130] From this examination, it can thus be seen that the legislative bodies of the respective jurisdictions discussed all had substantially the same common intention, object and purpose in enacting their own versions of CIPAA as our Parliament in relation to CIPAA. Adjudication was considered the most viable option in addressing the same ills or inequitable practices faced by the construction industries the world over – payment disputes over progress or stage payments. The disputes invariably were on delayed, insufficient or simply non-payment of interim claims made by main, subcontractors or sub-subcontractors.

[131] I am fortified in these observations when the Explanatory Statement of the Bill on CIPAA is examined:

> The Construction Industry Payment Adjudication Act 2011 ('the proposed Act') seeks to facilitate regular and timely payment in respect of construction contracts and to provide for speedy dispute resolution through adjudication. The purpose of the proposed Act is to alleviate payment problems that presently prevails pervasively and which stifles cash flow in the construction industry. The proposed Act further provides default payment terms in the absence of provisions to that effect and prohibits conditional payment terms that inhibit cash flow. The Act also seeks to provide remedies for the recovery of payment upon the conclusion of adjudication.

[132] It can reasonably be deduced that the hallmarks of adjudication or the key elements of adjudication would be the provision of a speedy, interim resolution mechanism for payment disputes. When an adjudication decision results in payments, there are remedies for recovery of such payments. Given that it is only an interim remedy to uncork the blockage in the cash flow which is the life blood of the construction industry, it may be, in a sense, be liken to a stent that is frequently put in place in arterial blockages through angioplasty etc. The experiences of other jurisdictions have been positive and encouraging; such that the Malaysian Parliament has seen fit to duplicate, but with modifications, many of the provisions found in the relevant legislations of those jurisdictions.

[133] Here, I am once again reminded of what May LJ said in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* of how it is in the nature of construction contracts to 'generate disputes about payment'. Where there are 'delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work

done often have reasons, good or bad, for saying that the additional payment is not due'. This diametrically opposing stance unfortunately, does no one any good; including for instance the innocent purchaser of the property; or the owner of the property being developed. This impasse was recognised as stifling the lifeblood of the industry that policy intervention through legislation was seen fit. CIPAA is intended to provide an intervening provisional decision or 'a temporary balance ... in appropriate circumstances ... in favour of those who claim payment, at the temporary expense if necessary of those who pay'. These adjudication decisions, 'being quick and dirty', also 'provide a quick enforceable interim decision under the rubric of 'pay now, argue later', are necessary so as to give 'life' back to the enterprise or underlying contract which had reached an impasse or stalemate. It is in the very nature of the scheme or mechanism that the substantive issues relating to the payment can still be argued at a later point; or taken concurrently at separate proceedings initiated in court or at arbitration.

[134] It is absolutely vital, if not imperative, that this ethos of adjudication focused on a payment procedure or mechanism is fully appreciated before one can address the issue of the operation and application of the Act. Without this understanding or full appreciation of the intention of Parliament insofar as CIPAA is concerned runs the risk of giving the Act a sterile and literal interpretation. This, in turn, may undermine, frustrate or render futile to the extent of emasculating the efforts of Parliament in this regard.

Operation and application of the CIPAA

[135] Having examined the provisions of CIPAA, appreciated Parliament's intention in respect of CIPAA, understood how other jurisdictions have dealt with adjudication, the next step is to recognise the Act for what it is; and that it is an Act providing for a 'speedy dispute resolution through adjudication'. The dispute that needs speedy resolution must necessarily be a dispute over payment claims in construction contracts. The provisions in the Act regulate the whole process of adjudication and for matters connected and incidental to adjudication. All this serves the object of ensuring and facilitating 'regular and timely payment in respect of construction contracts'. This is also evident from the short title of the Act: 'Construction Industry Payment and Adjudication Act'.

[136] Seen in its proper perspective, it cannot be denied that adjudication is nothing more than a dispute resolution mechanism. It is a regime, process or procedure before which the parties' disputes or differences over payments claimed by one party against the other party will be determined by an adjudicator. That adjudicator's decision (as opposed to an award or an order), though enforceable, is only provisional for the intervening period, commonly

referred to as 'temporary finality'. Through CIPAA, adjudication is offered on a statutory framework and it is offered as an additional alternative to existing payment dispute resolution forums such as the court and arbitration specially and specifically for the construction industry. This is clear from the speeches of the Deputy Minister as reported in *Hansard*; the regimes practised in other jurisdictions; case law discussed; as well as a reading of the provisions of CIPAA, in particular ss 13 and 37.

[137] Section 13 provides that the adjudication decision is binding unless:

(a) it is set aside by the High Court on any of the grounds referred to in s 15;

(b) the subject matter of the decision is settled by a written agreement between the parties; or

(c) the dispute if finally decided by arbitration or the court.

[138] Further, sub-s 37(1) provides:

> A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.

[139] The next question that arises is whether adjudication is available to all payment disputes, regardless of when these payment disputes arose. It was the submission of counsel arguing for a prospective reading or interpretation of CIPAA that because there are no express stipulations on the application of the Act; this absence necessarily meant that the Act applies prospectively; or in the case of KLRCA, Mr Monteiro and Mr Mohanasundram; that although the Act applies to construction contracts made before the Act came into force, the Act only applies to payment disputes that arose after the Act came into force. Mr Mah, on other hand, submitted that adjudication is only available to construction contracts made after 15 April 2014 which consequently meant that the payment disputes that could be referred to adjudication under the auspices of CIPAA necessarily had to be those that arose after the Act came into force. Mr Faisal submitted otherwise. He took the position that the Act applies to construction contracts made before the Act came into force; and that implicitly meant that the Act would apply to payment disputes that arose before the Act came into effect.

[140] The court agrees with Mr Faisal. It is the view of this court that contrary to the submissions made, there are indeed express prescriptions in the Act on the limits of the applicability of the Act. The answer to the question of application is actually provided in the Act itself, specifically in ss 2, 3 and 41 of the Act. Sections 2 and 3 of the CIPAA read as follow:

Application

2 This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.

Non-application

3 This Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.

[141] It is clear from a reading of s 2 that Parliament intended that the Act was to apply to construction contracts made in writing and for the territorial application of the Act as opposed to the date when that written construction contract is made. I have already discussed the definition of 'construction contract' earlier. While the definition is wide in its cover, CIPAA does not apply to just any contracts; it only applies to construction contracts. Even then, the construction contracts must be 'made in writing'; and the subject matter of the construction contracts must relate to construction work carried out wholly or partly in Malaysia.

[142] The court accepts that there have been instances where Parliament has provided for the application of legislation only to contracts made after the date of coming into force of the Act. This is especially the case where the legislation seeks to introduce new regimes. For example, when the Consumer Protection Act 1999 (Act 599) was first introduced as legislation to 'provide for the protection of consumers, the establishment of the National Consumer Advisory Council and the Tribunal for Consumer Claims, and for matters connected therewith', sub-s 2(1) expressly provided for the application of the Act while sub-s 2(2) expressly provided for the non-application of the Act:

2(1) Subject to subsection (2), this Act shall apply in respect of all goods and services that are offered or supplied to one or more consumers in trade.

(2) This Act shall not apply–

(a) to securities as defined in the Securities Industry Act 1983 [Act 280];

(b) to futures contracts as defined in the Futures Industry Act 1993 [Act 499];

(c) to contracts made before the date on which this Act comes into operation;

(d) in relation to land or interests in land except as may be expressly provided in this Act;

(e) to services provided by professionals who are regulated by any written law;

(f) to healthcare services provided or to be provided by healthcare professionals or healthcare facilities; and

(g) to any trade transactions effected by electronic means unless otherwise prescribed by the Minister.

[143] Pursuant to paragraph 2(2)(c), it is expressly provided that the Consumer Protection Act does not, inter alia, apply 'to contracts made before the date on which the Act comes into operation' or the date the Act comes into force or effect. Subsections 2(1) and (2) of the Consumer Protection Act are in fact similar to ss 2 and 3 of the CIPAA in that they provide for the application and non-application of the respective Acts. It is the view of this court that, through ss 2 and 3, Parliament has expressed its intention on the issues of application and non-application. It is entirely within the purview of Parliament to decide on the limits or the how and extent of the application of CIPAA; more so when it had examined the legislative regimes of several other jurisdictions.

[144] In my opinion, it is actually inappropriate and incorrect to suggest that there are no provisions in CIPAA on the matter of its application just because the provisions are not in the terms sought. It is the undoubted intention of Parliament that CIPAA applies to all construction contracts made in writing regardless of when those contracts were made so long as those construction contracts are to be carried out wholly or partly within the territory of Malaysia. Even construction contracts made by the Government fall within the purview of CIPAA.

[145] I am fortified in my view when s 2 is read together with s 41. Section 41 is a savings provision and it reads:

> 41 Savings
>
> Nothing in this Act shall affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act.

[146] The effect of s 41 is to save or exclude those proceedings relating to any payment dispute under a construction contract which have already been commenced in any court or arbitration before 15 April 2014 from the operation or operative effect of the application provision in s 2. Those proceedings are expressly excluded or preserved from the effect of the new law; and are expected to continue as if the Act never came into force for the related payment dispute. This is consistent with what Edgar Joseph FCJ expressed in the Federal Court case of *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 at p 14; [1996] 1 CLJ 529 at p 538:

> It is a well-known canon of construction that the intention of a saving provision is to narrow the effect of the enactment in which it is found so as to preserve some

existing legal rule or right, as the case may be, from its operation. It therefore differs from a proviso which is generally concerned with limiting the new provision made by the section to which it is attached. The cases of *Alton Woods* [1600] 1 Co Rep 40 b; *Arnold v Gravesend Corp* [1856] 2 K & J 574 at p 591; *Butcher v Henderson* (1868) LR 3 QB 335 show that a saving is taken not to be intended to confer any right which did not exist already.

[147] As a corollary, it may be said that if there was no savings provision inserted, there may just have been some room to begin an argument for an interpretation of prospective application of CIPAA. However, given that there is a clear specific savings provision in s 41, that possible argument must now be put to rest.

[148] Mr Mah has diligently researched and analysed the position on this aspect in the relevant laws of those jurisdictions identified above and more; to which the court is grateful. I shall set out the results of those efforts:

Housing Grants, Construction and Regeneration Act 1996 (United Kingdom)

104 Construction Contracts

(6) This Part applies only to construction contracts which–

(a) are entered into after the commencement of this Part.

Construction Contract Act 2002 (New Zealand)

9 Subject to sections 10 and 11, this Act applies to every construction contract (whether or not governed by New Zealand law) that–

(a) relates to carrying out construction work in New Zealand; and

(b) is either–

(i) entered into on or after the date of commencement of this Act; or

(ii) entered into before the date of commencement of this Act and that is renewed for a further term on or after that date (except that this Act has effect only in relation to obligations that are incurred or undertaken on or after that date); and

(c) is written or oral, or partly written and partly oral.

Building and Construction Industry Security of Payment Act 2004 read together with Rule 4 Building and Construction Industry Security of Payment Regulations (Singapore)

4 Application of Act

(1) Subject to subsection (2), this Act shall apply to any contract that is made in writing on or after 1st April 2005, whether or not the contract is expressed to be governed by the law of Singapore.

Contracts excluded from application of Act

4 Any contract which satisfies the following conditions shall be excluded from the application of the Act:

(a) the contract is made, in writing, within a period not exceeding 6 months from 1st April 2005;

(b) the contract is a sub-contract made under a main contract; and

(c) the main contract is made before 1st April 2005.

Building and Construction IndustrySecurity of Payment Act 1999 (New South Wales)

Part 2 – Provisions consequent on enactment of Building and Construction Industry Security of Payment Act 1999

2 Certain construction contracts not affected A provision of this Act does not apply to a construction contract entered into before the commencement of that provision.

Building and Construction Industry Security of Payment Act 2002 (Victoria)

7 Application of Act

(6) This Act does not apply to a construction contract entered into before the commencement of this section.

Building and Construction Industry Payments Act 2004 (Queensland)

3 Application of Act

(1) Subject to this section, this Act applies to construction contracts entered into after the commencement of Parts 2 and 3 ...

Construction Contracts Act 2004 (Western Australia)

7 Construction contracts to which this Act applies

(1) This Act applies to a construction contract entered into after this Act comes into operation.

Construction Contracts (Security of Payments) Act 2004 (Northern Territory of Australia)

9 Construction contracts to which this Act applies

(1) This Act applies to a construction contract entered into after the commencement of this section.

Building and Construction Industry (Security of Payment) Act 2009 (Australian Capital Territory)

9 Application of Act

(6) To avoid doubt, this Act does not apply to a construction contract entered into before the commencement of this Part.

[149] As can be seen, each of those jurisdictions have expressly provided for the application of their statutory adjudication regimes to construction contracts made after their respective Acts have come into force. It was open for Parliament to have inserted a similar provision. It chose not to. Instead, it provided for the requirement of a written construction contract and for the territorial application of the Act; and that the Act was not to apply to what may generally described as construction contracts concerning private homes. Such provisions are deliberate decisions which the courts cannot ignore.

[150] Mr Mah's research has also taken him to two states in Australia, namely South Australia and Tasmania, where the legislation is said to be silent on whether the relevant Act applies prospectively or retrospectively. According to learned counsel, 'an analysis of all reported cases show clearly that these Acts have been applied prospectively in accordance with the presumption against retrospective application'. He then cited what he says 'is an exhaustive list of cases on the application of both Acts', none of which 'involve the retrospective application of either Acts': *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2)* [2013] SASCFC 124; *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd* [2013] SADC 39; *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd* [2013] SASCFC 99; *Adelaide Interior Linings Pty Ltd v Romaldi Constructions Pty Ltd* [2013] SASC 110; *Built Environs Pty Ltd v Tali Engineering Pty Ltd*; *Mykra Pty Ltd v All State Maintenance Pty Ltd* [2014] SADC 149.

[151] According to learned counsel, these cases illustrate that although the Building and Construction Industry Security of Payment Act 2009 Act of South Australia was enacted on 10 December 2009, the disputes related only to contracts dated after the Act had come into force. The position was said to be the same in the case of the Building and Construction Industry Security of Payment Act 2009 for Tasmania. Similarly, the cases of *Chugg v Goodwin* [2012] TASMC 38; *Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd* [2013] TASSC 3 and *Q Civil & Construction Pty Ltd v Nadler* [2013] TASMC 45 illustrate that although the Act was enacted on 17 December 2009, the disputes related to contracts made after that date.

[152] With respect to learned counsel, while the exercise is enlightening and much appreciated, it does not shed any light as to the issue of whether the particular Act in question applies prospectively or retrospectively in relation to the relevant construction contracts. Insofar as those cases were concerned, the issue just did not come up for consideration. While South Australia may have turned to NSW for precedent when enacting their equivalent CIPAA and where NSW has an express provision as to the prospective application of its Act, the South Australian Legislature nevertheless did not do so. I have examined the savings provision found in s 32 of the 2009 Act; and it may be

concluded that what has been saved from the operation of the 2009 Act is entirely different from our s 41. The positions in the other jurisdictions really do not alter the conclusions and interpretations that this court has reached.

[153] Further, this court is of the view that there is no place for the interpretation offered by some of the counsel that the Act only applies to payment disputes which arise after the Act has come into force. KLRCA issued Circular No 1 on 23 April 2014 which states:

> For the purposes of administration of adjudication cases by the KLRCA under CIPAA, including the appointment of an adjudicator under CIPAA, the KLRCA takes the position that CIPAA applies to a payment dispute which arose under a construction contract on or after 15.4.2014, regardless of whether the relevant construction contract was made before or after 15.4.2014. In this regard, a payment dispute under a construction contract is said to have arisen when the non-paying party has, in breach of the contract, failed to make payment by the contractual due date for payment.

[154] With respect, while there may have been good practical reasons for KLRCA's issuance of the circular which has no force of law as it does not purport to have been issued under ss 32 or 33 of the Act, this runs contrary to the express provisions in the Act. In any event, the Act does not make any provision for such a distinction in its application. From Mr Lam's submissions, I understand this distinction is as a result of the understanding of how a payment dispute evolves and the interpretation of s 41. Learned counsel had submitted that a payment dispute starts with the making of a payment claim and the process of adjudication. It is this understanding that has caused the parties to suggest that a payment dispute only comes into being, exists or crystallises when the process under the Act is initiated.

[155] I am of the respectful view that this is artificial and a fallacy. Adjudication and the Act for that matter, is but a piece of legislation emplaced by Parliament to provide for, inter alia, a mechanism to speedily settle payment disputes which in reality are disputes over interim and final progress claims. The payment disputes arise under the construction contract that underpins the relationship between the parties; and Parliament has decided to legislate by reference to the construction contract and not, the payment dispute. That is the material or relevant point of reference; and not the date of the payment dispute. We should not attempt to rewrite those terms lest the court be accused of trespassing on the jurisdiction of Parliament to legislate. See the decision of *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 in this regard.

[156] Mr Mah has offered a slightly different take: he has urged the court to consider that the relevant or material date should be the date when the cause of

action arose. For this, he relies on the House of Lords decision in *Wilson v First County Trust Ltd* [2003] 4 All ER 97 where it was held that it was necessary to look at the event which gives rise to the debt in question when considering retrospective application.

[157] The House of Lords adopted the rule that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction. It was Mr Mah's submission that accordingly, the relevant date for consideration is the date that the cause of action arose, compared with the date the law came into force. Since the defendant in his case is disputing the plaintiff's right to rationalise the rock coring rates; and since this is an allegation of breach of contract, the relevant date would be when the first rationalisation notice was issued on 24 January 2014. That date is clearly a date before CIPAA came into force. The defendant expressed its disagreement with the rationalised rates on 28 January 2014. It was his submission that 'As a whole, the events which gave rise to the Defendant's claim occurred before 15.4.2014'; in which case the Act did not apply.

[158] Once more, the court disagrees for the same reasons that the court has rejected the suggestion that the material date is the date when the payment dispute arose or crystallised. As was the case in *Westcourt Corp Sdn Bhd* where the Court of Appeal had commented that the interpretation against retrospective application had been premised on wrong assumptions of what was material for determining the issue of application, so have the counsel in the two cases before the court. On our present facts, s 2 is patently clear as to what is the material determinant; that it is by reference to the construction contract and nothing else. It is not by reference to payment dispute or to the cause of action; only the construction contract and where that contract is to be carried out. These are the only qualifiers and the court should not again, attempt to rewrite the terms legislated by Parliament.

[159] There are other equally cogent reasons why CIPAA is to apply retrospectively in the sense that it applies to construction contracts made before 15 April 2014; and by that reasoning, apply to the payment disputes that arose before that date.

[160] For this, I return to the ethos of CIPAA. Since it is to provide a speedy procedure for the temporary resolution of payment disputes in construction contracts through the introduction of a fresh or new forum called 'adjudication', it would be appropriate to say that such legislation is in character, truth and substance, procedural and adjectival legislation. Such legislation or statuteis presumed in law to be applied retrospectively unless

there is clear contrary intention in the statute itself. Support for this principle of statutory interpretation can be found in the Indian Supreme Court's decision in *New India Insurance Co Ltd v Smt Shanti Misra* AIR 1976 SC 237 at p 240, where it was held:

> On the plain language of Sections 110A and 110F there should be no difficulty in taking the view of the change in law was merely a change of forum i.e., a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. If by express words the new forum is made available to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective.

[161] This principle or 'well-established proposition' that 'a change of adjectival or procedural law operates retrospectively' was applied by the Federal Court in *Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah*. In affirming the decision of the Court of Appeal, the Federal Court said at p 349 (MLJ); p 217 (CLJ):

> Dari suatu sudut yang lain, wajar diingat bahawa Akta Pindaan memperuntukkan perubahan forum daripada mahkamah kepada tribunal. Ketara ini adalah perkara berkaitan prosedur dan bukannya substantif. Oleh yang demikian ianya adalah berkuatkuasa kebelakangan. Prinsip ini telah ditegaskan di dalam kes-kes *Ramzan Darzi & Ors v Mst Azizi & Ors* [1976] CLJ 897 dan *New India Insurance Co Ltd v Shanti Misra* AIR 1976 SC 237. Di dalam kes *Ramzan Darzi*, Jaswant Singh CJ di dalam penghakiman majoriti berkata di ms 898–899:
>
> > The point that therefore remains for consideration is whether the choice of forum relates to the realm of procedure or not. That the choice of forum is a matter of procedure and is not a matter of substantive right and in most cases a new Act would have retrospective effect so far as the choice of forum is well settled. Reference in this connection may be made to a decision of the Allahabad High Court in *Hazari Tewari v Mt Maktula* AIR [1932] All 30, where Sulaiman, Ag CJ while interpreting the new Tenancy Act which conferred jurisdiction on the revenue court and barred the jurisdiction of the civil court in the matter of a suit in respect of which adequate relief could be obtained by way of a revenue suit observed as follows:
> >
> > > The choice of forum is a matter of procedure and not a substantive right, and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned.
> >
> > To the same effect is a decision of the Madras High Court in *VC K Bus Service v HB Sethna* AIR [1965] Mad 149 where it was held as follows:
> >
> > > No litigant has or can have, vested right in a particular forum. He cannot say as a matter of right that his suit or application should be tried by this or that forum which existed on the date his cause of action arose. Forum belongs to the realm of procedure and does not constitute substantive

> right of a party or a litigant. It should also be borne in mind that cause of action is not to be confused with a forum, and a cause of action, whatever vested rights it may carry with it, does not include a right to insist upon a particular court or Tribunal or Judge or any other. It follows, therefore, that any statutory law which changes a forum, may not raise a question of retrospective operation, unless, of course in exceptional cases, it is inseparably intertwined with vested rights.

Di dalam kes *New India Insurance Co Ltd v Shanti Misra*, supra, Untwalia J menyatakan demikian di ms 240:

> On the plain language of Sections 110A and 110F there should be no difficulty in taking the view that the change in law was merely a change of forum ie, a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The expressions 'arising out of an accident' occurring in sub-section (1) and 'over the area in which the accident occurred', mentioned in sub-s (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred.

[162] In that case, the Federal Court had to examine the issue of whether the Tribunal for Homebuyer Claims set up under the Housing Developers (Control and Licensing) (Amendment) Act 2002 which amended the principal Act, that is, the Housing Developers (Control and Licensing) Act 1966, had jurisdiction to hear claims which were brought before it irrespective of the dates of the sale and purchase agreements. This tribunal was set up to hear claims lodged by homebuyers for liquidated damages in connection with late delivery of homes purchased by them. After examining the provisions of the Amendment Act, the Federal Court concluded that the Amendment Act was only legislation introducing a change of forum which clearly related to procedure and not substantive law in which case, the law operated retrospectively.

[163] At first instance of *Westcourt Corp Sdn Bhd*, the High Court judge had held that in the absence of express provision to the contrary the Amending Act had no retrospective effect on sale and purchase agreements entered into before the appointed date of coming into force of the provision establishing the tribunal. The court below was of the view that to allow retrospective effect of the jurisdiction of the tribunal would result in substantive rights being affected to their prejudice. The court also held that retrospectivity would infringe art 7 of the Federal Constitution because penalty may be imposed for any failure to comply with any award handed down by the tribunal.

[164] In allowing the appeal, the Court of Appeal approached the issue of the retrospective operation of the Act from a slightly different perspective. The court held that the tribunal had 'jurisdiction to entertain and adjudicate upon claims lodged with it notwithstanding the sale and purchase agreements were entered into before 1 December 2002. And accordingly the issue of retrospectivity of s 16AD vis a vis an award given by the tribunal should not arise'. 1 December 2002 was the 'appointed date' when the tribunal began to function. One of the arguments raised by the respondents in the appeal was that 'if it was the intention of Parliament to allow retrospective effect, it would have done so by inserting a similar provision to that of the new s 22C of the principal Act'. In rejecting that argument, the Court of Appeal said that if the respondents' arguments were affirmed, it:

> ... would be contrary to a settled principle of law that statutes must be read as a whole (see *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 CLJ 559. And literal interpretation of a statute is not applicable in all cases. There are circumstances where the nature and purpose of a particular legislation must be considered when construing its various provisions so as not to defeat the intention of Parliament (see *Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2002] 4 CLJ 689; *Sea Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305).

[165] The Court of Appeal went on to say at p 23 (MLJ); p 625 (CLJ) that:

> In the instant case we are of the view that the Principal Act as amended by the Amending Act is a piece of social legislation and hence its provisions should be given a liberal and purposive interpretation. In the case of *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 CLJ 547, the Federal Court speaking through His Lordship Steve Shim CJ (Sabah and Sarawak) on the Industrial Relations Act 1967 said this at p 554:
>
> > Quite clearly the IRA is a piece of social legislation whose primary aim is to promote social justice and industrial peace and harmony in this country. As such, the approach to interpretation must be liberal in order to achieve the object aimed at by Parliament. This has been described by Lord Diplock as the 'purposive approach' an approach followed by Lord Denning in *Nothman v Barnet Borough Council* [1978] 1 WLR 220 who reiterated that in all cases involving the interpretation of statutes, we should adopt a construction that would promote the general legislative purpose underlying the provision.
>
> A similar view was also expressed by the Federal Court in *Hoh Khiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 where it was said at p 707:
>
> > Now, it is well settled that the Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In accordance with well settled canons of construction, such legislation must receive a liberal and not a restricted or rigid interpretation. If authority is required for this proposition, it is to be found in the decision of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan*

Bhd v Transport Workers' Union [1995] 2 CLJ 748. The three interconnected definitions which were cited by Salleh Abas LP in his judgment in *Inchcape* as well as s 20 (under which instant respondent's case was referred to in the Industrial Court) appear in a statute requiring liberal interpretation and for that reason should themselves be liberally interpreted, per Gopal Sri Ram JCA.

Applying therefore the liberal and purposive approach to the statutory provisions that deal with jurisdiction of the Tribunal we find that the argument advanced for the respondents is premised on at least two assumptions. Firstly, that the date in a sale and purchase agreement is material in determining the jurisdiction of the Tribunal. Secondly, any award given for a breach of a sale and purchase agreement entered into prior to the appointed date, particularly where the breach was before that date, would tantamount to allowing the criminal law to operate retrospectively since it was now punishable as an offence for failure to comply with or satisfy such award. This argument of course relates to the legal principle that criminal law cannot be made to operate retrospectively unless specifically stipulated (see *Dalip Bhagwan Singh v Public Prosecutor* [1997] 4 CLJ 645).

[166] As mentioned earlier, the Court of Appeal found the two assumptions to be 'without basis'. There were no provisions in the law that could be said to support that reading. The provisions did not stipulate a cut off point by reference to date of agreement vis a vis jurisdiction. All that was required of the tribunal assuming jurisdiction to hear a claim presented before it was 'to verify whether it is within the ambit of sub-s 16N(2) ...'.

[167] The Court of Appeal did not think that 'there should be any additional or pre-requisite term to be read into the provision. To do so would tantamount to adding what was not in the statute. And that should not be done since judges are not legislators. That was echoed in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 ...'. The Court of Appeal was further of the view that:

To limit therefore the jurisdiction of the tribunal to claims based on sale and purchase agreements entered into after the appointed date would tantamount to restricting the jurisdiction of the tribunal which Parliament never intended to do so. It is absurd in our view to say that Parliament proceeded to legislate for the establishment of the tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into as recent as the appointed date. Meanwhile the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which Parliament intended to address when it legislated for the establishment of the tribunal. As stated earlier, being a social piece of legislation a liberal and purposive approach should be adopted when construing the legislative provisions governing the threshold jurisdiction of the tribunal.

[168] The Court of Appeal added that the 'establishment of the tribunal is in

effect a creation of another forum intended for speedy disposal at a minimum cost ... There is therefore no question of the rights of anyone being eroded or removed...'.

[169] This decision of the Court of Appeal was wholly affirmed by the Federal Court; and the Federal Court added its own views about the applicable principles of statutory interpretations of legislations which are procedural in nature; and which have already been cited above.

[170] Similarly, these aspectsare present in CIPAA and they are immensely important and one must not lose sight of what CIPAA essentially is – a choice of forum. That being so, and applying the well established principle that legislation providing for this change of forum in the form of an additional forum known as adjudication, retrospective in operation unless there is provision to the contrary, and there is none here, CIPAA is indeed retrospective. There are clear provisions to the contrary in the legislations of those jurisdictions that Parliament and now, this court have looked at. The existence of those clear provisions to the contrary may be said to further confirm the opinion of this court on this point. CIPAA therefore applies to construction contracts regardless the dates when such contracts were made. Obviously, the construction contracts in the two cases before the court today come under the operation of the Act.

[171] Even if this court is in error in considering CIPAA as procedural legislation, this court will nevertheless consider CIPAA as falling within the category of 'social legislation' as described by the Court of Appeal and affirmed by the Federal Court in *Westcourt Corp Sdn Bhd*. While there is no definition of what exactly 'social legislation' is, it would be fair and reasonable to say that it would refer to legislation which is for the good and benefit of society.

[172] Going back to where we started on all the reasons why CIPAA was contemplated in the first place, the ills and stagnation of projects because of the starving of cash flows suffered by subcontractors and sub-sub contractors along the construction chain that Parliament had every intention of overcoming so that the construction industry, which contributes so substantially to the nation's economy, could get on with what it does best, and that is building quality buildings and infrastructure; it is difficult to say that CIPAA does not come within the understanding of 'social legislation'.

[173] In fact, I would go so far as to say that legislation which encourages any dispute to be resolved in a forum other than the court system must surely be construed as social legislation. Hence, CIPAA which provides adjudication as an alternative forum for payment dispute resolution as opposed to resorting to the court and arbitration, a liberal and purposive interpretation must be

adopted in relation to CIPAA. In so doing, the choice of an additional forum of resolution should surely be offered to all unless there is clear provision that it is not. Since there are no such provisions to allow for such an interpretation, CIPAA is retrospective insofar as the construction contracts are concerned; and that would include the present construction contracts before the court.

Substantive rights argument

[174] I come now to what is best described as the 'substantive rights' argument, canvassed by the plaintiffs in the two cases, and by KLRCA. The contention is this – that CIPAA should not be interpreted to apply retrospectively because there are provisions in CIPAA which do not deal with procedural matters but are in fact provisions dealing with substantive matters; or what was described by Mr Lam as 'interventionistic provisions'. The provisions identified by the various parties were ss 13, 28, 29, 30, 35, 36 and 37. These provisions are said to adversely affect substantive rights. These rights are sometimes referred to as 'vested rights', 'accrued rights' or 'acquired rights'.

[175] These are ss 28, 29, 30, 35 and 36 (ss 13, 35 and 37 were set out earlier):

> Enforcement of adjudication decision as judgment
>
> 28(1) A party may enforce an adjudication decision by applying tothe High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
>
> (2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
>
> (3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.
>
> Suspension or reduction of rate of progress of performance
>
> 29(1) A party may suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services under a construction contract if the adjudicated amount pursuant to an adjudication decision has not been paid wholly or partly after receipt of the adjudicated decision under subsection 12(6).
>
> (2) The party intending to suspend the performance or reduce the rate of progress of performance under subsection (1) shall give written notice of intention to suspend performance or reduce the rate of progress of performance to the other party if the adjudicated amount is not paid within fourteen calendar days from the date of receipt of the notice.
>
> (3) The party intending to suspend the performance or reduce the rate of progress or performance under subsection (1) shall have the right to suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services under a construction contract upon the expiry of fourteen

calendar days of the service of the notice given under subsection (2).

(4) The party who exercises his right under subsection (3)–

(a) is not in breach of contract;

(b) is entitled to a fair and reasonable extension of time to complete his obligations under the contract;

(c) is entitled to recover any loss and expenses incurred as a result of the suspension or reduction in the rate of progress of performance from the other party; and

(d) shall resume performance or the rate of progress of performance of the construction work or construction consultancy services under a construction contract in accordance with the contract within ten working days after having been paid the adjudicated amount or an amount as may be determined by arbitration or the court pursuant to subsection 37(1).

Direct payment from principal

30(1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.

(2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.

(3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.

(4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.

(5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

Default provisions in the absence of terms of payment

36(1) Unless otherwise agreed by the parties, a party who has agreed to carry out construction work or provide construction consultancy services under a construction contract has the right to progress payment at a value calculated by reference to –

(a) the contract price for the construction work or construction consultancy services;

(b) any other rate specified in the construction contract;

(c) any variation agreed to by the parties to the construction contract by

which the contract price or any other rate specified in the construction contract is to be adjusted; and

(d) the estimated reasonable cost of rectifying any defect or correcting any non-conformance or the diminution in the value of the construction work or construction consultancy services performed, whichever is more reasonable.

(2) In the absence of any of the matters referred to in paragraphs (1)(a) to (d), reference shall be made to –

(a) the fees prescribed by the relevant regulatory board under any written law; or

(b) if there are no prescribed fees referred to in paragraph (a), the fair and reasonable prices or rates prevailing in the construction industry at the time of the carrying out of the construction work or the construction consultancy services.

(3) The frequency of progress payment is –

(a) monthly, for construction work and construction consultancy services; and

(b) upon the delivery of supply, for the supply of construction materials, equipment or workers in connection with a construction contract.

(4) The due date for payment under subsection (3) is thirty calendar days from the receipt of the invoice.

[176] Before delving into the specifics of what exactly does one mean when one talks about substantive rights, it is appropriate that the principles of statutory interpretation is first, addressed. There is a long line of case authority issued from our own apex court on the principle of statutory interpretation. When we examine these cases, it will be readily seen that the principles of statutory interpretation consistently adopted and applied in our courts are no different from that practised in other jurisdictions cited by the parties whether of England, Canada, Australia or Brunei. While the cases cited from these other jurisdictions are of interest, this court will not be referring to them since we have our own. In any case, the counsel involved in the two cases before the court have cited our own local cases on this aspect quite exhaustively: *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36; *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] CLJ (Rep) 56; *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339; *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292; *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1; [1996] 1 CLJ 529; *RHB Bank Bhd v Ya' akob bin Mohd Khalib @ Abdul Ghani bin Muhammad* [2008] 1 MLJ 157; and *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 CLJ 207.

[177] It is this court's view that the construction and interpretation that the court has given to the issue of the retrospective application of CIPAA in no way derogates or offend the principles established and followed in these cases. These are the court's reasons.

[178] We start with understanding what that principle of statutory interpretation is. One of the earliest cases expounding the principle is the Federal Court's decision in *Lee Chow Meng v Public Prosecutor*. It involved a criminal case. The appellant had been convicted and sentenced by the Special President in Kuala Lumpur. He appealed to the High Court; and lost. That would have been the end of the criminal proceedings in court except if he had invoked the s 66 of the Courts of Judicature Act 1964 and referred to a question of public interest to the Federal Court. The appellant did so. But, by the time the reference came up to the Federal Court, there was an amendment to the CJA providing for an ordinary right of appeal to the Federal Court against the decision of the High Court. The High Court however, could not make a reference. The Federal Court struck off the appeal on the basis that the court had no jurisdiction to deal with the matter.

[179] This is what the Federal Court said at p 37:

> A statute dealing with procedure has retrospective effect, that is, it applies to proceedings begun before and after commencement of the statute, unless a contrary intention is expressed or clearly implied. This was so stated by Lord Blackburn in *Gardner v Lucas.*
>
> > ... it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other way they should not be.
>
> On the other hand, a statute dealing with rights has effect only for the future and is not to be construed retrospectively, it does not apply to proceedings begun before its commencement, it only affects proceedings begun after that, unless there is a clear intention to the contrary. This is so stated by Jessel MR in *Re Joseph Suche & Co Ltd* in the following words:
>
> > It is a general rule that when a legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them.

[180] Another landmark decision is that of the Privy Council in *Yew Boon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1. In that case, the appellants did not file their claim for damages for personal injuries in an accident against the respondent, a public authority, within the 12 months from the date of the accident. The relevant limitation period was that prescribed under s 2 of the

Public Authorities Protection Ordinance 1948. This 12 month period was extended to 36 months when the Ordinance was amended. At the time of the Amendment Act, the limitation period under the 1948 Ordinance had set in. The action was filed 21 months after the date of the accident.

[181] The question for determination by the Privy Council was whether the Amendment Act applied retrospectively or prospectively. The issue was being considered under s 13 of the Interpretation and General Clauses Ordinance 1948 which was replaced by s 30 of the Interpretations Act 1948 and 1967; and under common law principles. Although the 1948 Ordinance and the Amendment Act was found to be procedural in character, the Privy Council held that the respondents in this case had acquired an accrued right to a defence on limitation, and that the Amendment Act could not be construed to be retrospective because to do so would impair an existing right or obligation.

[182] This is how Lord Brightman speaking on behalf of the Privy Council addressed the issue which actually concerns two propositions:

> Their Lordships turn to consider the propositions that a Limitation Act which is not expressed to extinguish a cause of action is procedural and that a statute which is merely procedural is prima facie retrospective. These two propositions lie at the root of the appellants' case.
>
> A statute of limitations may be described either as procedural or as substantive. For example, in English law, at the expiration of the period prescribed for any person to bring an action ...
>
> Apart from the provisions of the Interpretations Statutes, there is a common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

[183] However, Lord Brightman acknowledged that 'the expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in

one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself'.

[184] To this end, the Privy Council agreed with the approach to the 'procedural test' adopted by the Federal Court, and that 'The distinction between procedural matters and substantive rights must often be of great fineness. Each case therefore must be looked at subjectively; there will inevitably be some matters that are classified as being concerned with substantive rights which at first sight must be considered procedural and vice versa'. To this, the Privy Council added at p 5:

> Whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive ...
>
> Their Lordships consider the proper approach to the construction of the 1974 Act is not to decide what label to apply to it, procedural or otherwise but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations.

[185] The Privy Council also opined that 'Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and the relevant provisions of any interpretation statute'.

[186] This view was shared by the Court of Appeal in *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* (followed later by the Court of Appeal in *RHB Bank Bhd v Ya' akob bin Mohd Khalib @ Abdul Ghani bin Muhammad*). At p 296, the Court of Appeal said:

> The traditional approach to the interpretation of statutes (which includes subsidiary legislation such as the Rules of the High Court 1980) in this area is contained in the general rule that, in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective. In the case of rules of court, there is a rider to the general proposition. It is this. A rule of court should not be given an interpretation that would result in unfairness or produce manifest injustice: *Bank of America v Chai Yen* [1981] 1 MLJ 198 at p 199 (an authority not cited to the judge or to us by either side).
>
> Another way of stating the rule is to say that a construction against retrospectivity is placed on a statute to save vested rights but not existing rights: *West Gwynne* [1911] 2 Ch 1 at pp 11–12. But the rule, though easily state in its different forms, is difficult in its application to a particular case. And, it has been said that resort to such nomenclature as 'vested' and 'existing' is not particularly helpful in resolving difficulties: *Gardner & Co Ltd v Cone & Anor* [1928] All ER 458 at p 461.

> The classification of a statute in general terms as procedural or substantive is singularly unhelpful; for a statute may at once be procedural for one purpose and substantive for another, depending upon the context in which it is being construed: *Maxwell v Murphy* (1957) 96 CLR 261; *In the Estate of Fuld (No 3)* [1968] P 675 at p 695 per Scarman J; *Re Dosabhai Ardeshir Cooper* [1950] 52 Bom LR 625. It calls for a construction of the statutory provision as a whole: *Ramanathan Chettiar v Lakshmanan Chettiar* [1963] 1 Mad LJ 46 at p 50.

[187] At p 297, the Court of Appeal was of the view that the correct test to be applied to determine whether a written law is prospective or retrospective is to:

> ... first ascertain whether it would affect substantive rights if applied retrospectively. If it would then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.

[188] The case of *Sim Seoh Beng* concerned the interpretation of the amendment to O 29 of the Rules of the High Court 1980. Order 29 deals with applications for interim injunctions. The amendment introduced r 2B to O 29, the effect of which was to affix the validity period of two weeks to an injunction ordered on an ex parte basis where previously, there was no time limit imposed. Although the Rules of the High Court 1980 were clearly procedural in character, the Court of Appeal interpreted the amendment as affecting the substantive rights of parties. Accordingly, the Court of Appeal held that the amended rule could only apply prospectively. In the facts of the case, the ex parte injunction order was obtained before the amendment came into effect. The court held that the party in whose favour the order was made had a legitimate expectation that their injunction would continue until set aside on merits and that it would not lapse by mere effluxion of time. The Court of Appeal was of the further view that if the amended rule was construed as having retrospective effect, it would result in the destruction of the right protected by the injunction.

[189] Recently, the Federal Court in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* saw it fit to add its observations on the construction of statutes even though the parties were in agreement that reg 11(2) of the Licensee Supply Regulations 1990 (the regulations under consideration), post 2002, had no retrospective effect. In that case, the appellant claimed that the respondent was mistakenly undercharged a total of RM581,876.77 for electricity usage from October 1996–October 2002. The mistake was discovered by the appellant in January 2003.

[190] The trial court dismissed the claim by the appellant on the ground that the amendment to reg 11(2) of the Licensee Supply Regulations 1990 (which came into effect on 15 December 2002) prohibits retrospective adjustments of

a customer's account exceeding three months. The cause of action which was founded on a breach of contract meant that the cause of action accrued on the date of the breach of contract. Although the issue of retrospectivity was conceded by the parties, at p 755 (MLJ); p 217 (CLJ), the Federal Court stated that:

> ... we ... take this opportunity to uphold that it is indeed a rule of construction that a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute.

[191] In support, the Federal Court at p 755 (MLJ); p 216 (CLJ), inter alia, cited *Yew Bon Tew* and; *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 where Gunn Chit Tuan CJ (Malaya) said:

> On the retrospective operation of Acts, the presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears. In this case, that presumption has been rebutted because s 1(5) of the Amendment Act states in clear terms that the amendment was intended to be retrospective. But a retrospective operation should not be given to a statute to impair an existing right and it has been stated by the UK Court of Appeal in *EWP Ltd v Moore* [1992] 1 All ER 880 at p 891:
>
> > ... that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset ...
>
> Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 MLJ 1 at p 2:
>
> > A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.
>
> [7] If it takes away a substantive right, the amendment will not have retrospective effect, save by clear and express words. If it is procedural, retrospectivity applies unless otherwise stated in the statute concerned (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577 per Steve Shim CJ (Sabah & Sarawak) ...

[192] There are two important points that arise from these authorities. First, the general principles enunciated in these cases pertain to amending laws. Second, the rights that the courts meant were in fact rights conferred under the repealed or amended laws which were written laws in the first place.

[193] Over and above all the other considerations discussed, CIPAA is entirely new legislation. That, to my mind, is the single most significant and distinguishing factor that should not be glossed over. Furthermore, when the

courts in those various cases were discussing rights, vested, accrued, substantive, and the like, those rights were those already conferred by the existing laws. The amending laws were seeking to alter those rights, whether by revoking them or affecting them in some way or other. It is in that respect that the rights, being vested and accrued and thereby substantive, could not be disaffected by the amending law to the extent of prejudicing the affected party; or treating that party unfairly. That is a common law principle and it is encapsulated in s 13 of the Interpretation and General Clauses Ordinance and later s 30 of the Interpretation Acts of 1948 and 1967.

[194] An examination of s 30 will make this clearer. Section 30 reads as follow:

> Matters not affected by repeal
>
> 30(1) The repeal of a written law in whole or in part shall not–
>
> (a) affect the previous operation of the repealed law or anything done or suffered thereunder; or
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> (c) affectany penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or
>
> (d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,
>
> and any such investigation legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.
>
> (2) Without prejudice to the generality of subsection (1)–
>
> (a) the repeal of a written law which adopts, extends or applies another written law shall not–
>
> (i) invalidate the adoption, extension or application; or
>
> (ii) prejudicially affect the continued operation of the adopted, extended or applied law; and
>
> (b) the repeal of a written law which amends another written law shall not–
>
> (i) invalidate the amendments made by the repealed law; or
>
> (ii) prejudicially affect the continued operation of that other law as amended.

[195] Section 29 of the Interpretation Acts is equally important. It states:

> 29 The repeal of a written law shall not revive any written law or other thing not in force or existing immediately before the repeal took effect, and in particular

(without prejudice to the generality of the foregoing) the repeal of a written law which itself repealed an earlier law shall not revive that earlier law.

[196] From these provisions, it is obvious that the repealed law which had conferred a right, privilege, obligation or even liability must itself be 'written law'. That is clear from a reading of s 30.

[197] The next aspect to have regard to is that an acquired or incurred right, privilege, obligation is generally said to have vested when that right, privilege or obligation is exercised. It is in that sense that rights are described as 'vested'or 'substantive' rights; and it is in that sense that the issue of retrospectivity was discussed by the courts in those cases cited. This is apparent from each of those decisions cited that the court was considering the effect of amending laws on rights acquired under the repealed laws. Those amending or repealed laws either related to the grant of another right of appeal; the extension of limitation periods; or the conferment of rights to recover shortfalls in electricity tariffs.

[198] The House of Lords' decision in *Wilson v First County Trust Ltd* [2003] UKHL 40 is of assistance here. The case started from 'modest beginnings' before the County Court as a claim by a pawnbroker for repayment of a loan. Mrs Wilson pawned her property, a car for a [a3]5000 loan. Mrs Wilson challenged the enforceability of the loan agreement on the basis that it did not contain all the prescribed terms; and she sought a return of her car. Although Mrs Wilson appeared in person at the first instance, the attorney general appeared on behalf of the Secretary of State for Trade and Industry with the House of Commons and the Clerk of Parliaments subsequently intervening. So, did a host of other associations.

[199] What had happened is when Mrs Wilson signed her agreement and pawn receipt she was charged a 'document fee' of [a3]250. This was added to the amount of her loan. The loan agreement was a regulated agreement under the Consumer Credit Act 1974. Such an agreement is not a properly executed agreement if it did not contain all the prescribed terms; one of those terms required the 'amount of credit' to be stated. If the prescribed terms were not stated, s 127(3) precluded the court from enforcing the agreement.

[200] At first instance, the document fee was found to be part of the amount of credit and so, the agreement was enforceable. But, the agreement was reopened as an extortionate credit bargain and so the amount of interest chargeable was halved. Wilson appealed. Pending appeal, she redeemed her car upon payment of [a3]6,900. That was in December 1999.

[201] The appeal before the Court of Appeal was heard in November 2000 by which time the Human Rights Act 1998 had come into force. The Court of

Appeal analysed the statutory provisions and concluded that the document fee was not credit for purposes of the 1974 Act and therefore the prescribed terms had not been properly stated. The upshot would have been that Mrs Wilson would be repaid the [a3]6,900 with interest, and she would get to keep her car. 'The overall result was that Mrs Wilson was entitled to keep the amount of her loan, pay no interest and recover her car'. The Court of Appeal, through Sir Andrew Morritt V-C 'expressed concern at this outcome'; considered that it might be arguable that s 127(3) of the 1974 Act infringed article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the 1998 Act) article 1 of the First Protocol to the Convention; and adjourned the further hearing with notice to the Crown. This notice is required where the court is considering whether to make a declaration of incompatibility. This accounted for the involvement of Secretary of State for Trade and Industry and other parties subsequently.

[202] Thereafter, the Court of Appeal decided that the section was indeed incompatible; and the Secretary of State for Trade and Industry appealed. While accepting certain positions, the Secretary of State for Trade and Industry challenged the court's jurisdiction in making a declaration of incompatibility in relation to events occurring before the 1998 Act came fully into force on 2 October 2000. Since the agreement was made in January 1999 and it was for a period of six months, the contention was that the parties' rights ought to be determined by reference to the law before the 1998 Act came into force.

[203] In coming to its decision that the court could not make a decision of incompatibility an agreement governed by the 1974 Act which was entered before the 1998 Act, the House of Lords examined the issue of retrospectivity. On that aspect, Lord Scott's remarks at p 142 are relevant:

> [153] It is, of course, open to Parliament, if it chooses to do so, to enact legislation which alters the mutual rights and obligations of citizens arising out of events which predate the enactment. But in general Parliament does not choose to do so for the reason that to legislate so as to alter the legal consequences of events that have already taken place is likely to produce unfair or unjust results. Unfairness or injustice may be produced if persons who have acquired rights in consequence of past events are deprived of those rights by subsequent legislation; or it may be produced if persons are subjected on account of those past events to liabilities that they were not previously subject to. There is, therefore, a common law presumption that a statute is not intended to have a retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect (see *Maxwell on Interpretation of Statutes* (12th Ed, 1969) p 215 and *Bennion Statutory Interpretation* (4th Ed, 2002) pp 265–266 and 689–690). The presumption can be rebutted if it sufficiently clearly appears that it was indeed the intention of Parliament to produce the result in question. The presumption is no more than a starting point.

[204] An interesting point noted by the House of Lords was the distinction between the two terms, 'retroactive' and 'retrospective' and the need to have regard to that distinction. At p 150, Lord Rodger, quoting Cozens-Hardy MR and Buckley LJ's observations in *West v Gwynne* [1911] 2 Ch 1 stated:

> In that case the plaintiffs were assignees of a lease dating from 1874. The lease contained a covenant by the lessees against underletting the premises or any part thereof without the consent in writing of the landlord. Section 3 of the Conveyancing and Law of Property Act 1892 provided:
>
> > In all leases containing a covenant ... against ... underletting ... the land or property leased without licence or consent, such covenant ... shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent ...
>
> In 1909 the plaintiffs applied to the defendant landlord for his consent to a proposed underlease of part of the premises but he replied that he was prepared to grant a licence only on condition that he should receive for himself half of the sum by which the rent of the underlease exceeded the rent payable under the lease. The plaintiffs sought a declaration that the defendant was not entitled to impose the condition. The question was whether s 3 of the 1892 Act applied to a lease executed before the commencement of the Act. The Court of Appeal held that it did. Cozens-Hardy MR said ([1911] 2 Ch 1 at p 11):
>
> > It was forcibly argued by [counsel for the defendant] that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. I assent to this general proposition, but I fail to appreciate its application to the present case. 'Retrospective operation' is an inaccurate term. Almost every statute affects rights which would have been in existence but for the statute. Sect. 46 of the Settled Estates Act 1877 ... is a good example of this. Sect. 3 does not annul or make void any existing contract; it only provides that in the future, unless there is found an express provision authorizing it, there shall be no right to exact a fine. I doubt whether the power to refuse consent to an assignment except upon the terms of paying a fine can fairly be called a vested right or interest. Upon the whole I think s. 3 is a general enactment based on grounds of public policy, and I decline to construe it in such a way as to render it inoperative for many years wherever leases for 99 years, or it may be for 999 years, are in existence'.
>
> Buckley LJ observed (at pp 11–12):
>
> > During the argument the words 'retrospective' and 'retroactive' have been repeatedly used, and the question has been stated to be whether s. 3 of the Conveyancing Act 1892, is retrospective. To my mind the word 'retrospective' is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of

the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law. Numerous authorities have been cited to us. I shall not travel through them. To my mind they have but little bearing upon this case. Suppose that by contract between A. and B. there is in an event to arise a debt from B. to A., and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. Such was the point which arose in *Moon v Durden* (*Moon v Durden* (1848) 2 Ex 22, 154 ER 389) and in *Knight v Lee (* [1893] 1 QB 41). But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A.'s right in an event to become a creditor of B. As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning.

[205] At the conclusion of his examination, Lord Rodger made this very telling remark:

As the sparks fly upward, individuals and businesses run the risk that Parliament may change the law governing their affairs.

[206] Another point that was made by the House of Lords was the meaning of 'vested rights'; which is the reason why this decision was examined to start with. Again, Lord Rodger examined the law here and said at p 153:

The presumption is against legislation impairing rights that are described as 'vested'. The courts have tried, without conspicuous success, to define what is meant by 'vested rights' for this purpose. Although it concerned a statutory rule resembling s 16(1)(c) of the Interpretation Act 1978, the decision of the Privy Council in *Abbott v Minister for Lands* [1895] AC 425 is often regarded as a starting-point for considering this point. There Lord Herschell LC indicated (at 431), that, to convert a mere right existing in the members of the community or any class of them into an accrued or vested right to which the presumption applies, the particular beneficiary of the right must have done something to avail himself of it before the law is changed. The courts have grappled with this idea in a series of cases which Simon Brown LJ surveyed in *Chief Adjudication Officer v Maguire* [1999] 2 All ER 859; [1999] 1 WLR 1778. It is not easy to reconcile all the decisions. This lends weight to the criticism that the reasoning in them is essentially circular: the courts have tended to attach the somewhat woolly label 'vested' to those rights which they conclude should be protected from the effect of the new legislation. If that is indeed

so, then it is perhaps only to be expected since, as Lord Mustill observed in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 All ER 20 at p 29; [1994] 1 AC 486 at p 525, the basis of any presumption in this area of the law 'is no more than simple fairness, which ought to be the basis of every general rule'.

[207] The position under CIPAA is distinctly different. There was no existing law to begin with. These sections which the parties have identified as provisions affecting their substantive rights are in reality not of the nature and description as that properly understood and accepted by the courts as being part of substantive or substantive rights. What the parties actually have are their own terms and conditions on these matters and emanating from their respective underlying construction contracts. These terms and conditions of contract are not the rights recognised and understood in those cases relied on and under s 30 of the Interpretation Acts to begin with.

[208] Even if accepting for a moment that these terms and conditions do and can amount to 'existing rights', such rights have not 'vested', 'accrued' or 'acquired' to the extent of warranting some degree of recognition or protection by the court by reason of the rules of simple fairness. This has not happened in either of the two cases before the court. Because if they have indeed vested in that these terms and conditions have been relied on, Parliament has clearly preserved those circumstances or situations under s 41. It is, of course, open to Parliament 'to enact legislation which alters the mutual rights and obligations of citizens; and in any case, 'Most Acts of Parliament, in fact, do interfere with existing rights'.

[209] Furthermore, it is clear from all the decisions discussed that it is not a case that if there are vested or substantive rights, those rights can never be altered. The position in law is that even those rights are not absolute and rigid. They can be affected. What is required as part of 'simple fairness', is that there be clear words of such will or intention from Parliament; or that a reading of the whole legislation brings one necessarily to that conclusion; or if a purposive interpretation has that effect.

[210] Applying those principles, it is the view of this court that the cases cited by learned counsel for the respective plaintiffs may be distinguished on the basis that CIPAA is new procedural legislation introducing a change of forum or a new forum; that there are no existing rights conferred by any written law which are affected in any way; that in any case a purposive interpretation warrants a retrospective application of CIPAA.

[211] In any case, having examined ss 13, 28, 29, 30, 35, 36 and 37, the court does not find any basis for any of the concerns expressed. Mr Mah had added

that the decision in *Westcourt Corp Sdn Bhd* should be distinguished from the application of CIPAA on the ground that unlike the situation in that case where there would be a 3–5 year delay from the date of the sales and purchase agreement to its breach at the completion date before any disputes were brought to the new Housing Tribunal, in contrast, it could be as soon a few months that disputes arise from new construction contracts. In construction contracts, a default can arise very early in the progress of the works. He also contended that CIPAA allowed a right to self-help immediately upon the non-compliance of the adjudication decision without the need for a further court order. If s 29 was given retrospective effect, this effectively meant giving claimants additional contractual rights which are not found in the original construction contract. For this reason, learned counsel contended that it could not have been Parliament's intention to imply a re-writing of the original construction contract.

[212] With respect, the court disagrees. Sections 28, 29 and 30 are found under Part IV of CIPAA under the heading 'Enforcement of Adjudication Decision'. These sections relate to enforcement of the adjudicator's decision and can only be material upon the adjudicator making a decision capable of being enforced. As was the case in *Westcourt Corp Sdn Bhd*, the Federal Court held at p 350 (MLJ); p 219 (CLJ):

> Mahkamah ini bersetuju bahawa s 16AD memperuntukkan liabiliti baru ke atas pemaju dan pembeli rumah jika mereka gagal mematuhi award Tribunal. Tetapi liabiliti ini adalah berkuat kuasa secara prospektif. Justeru itu, seksyen itu tidak melanggar perkara 7 Perlembagaan Persekutuan. Walau bagaimanapun, kemungkiran perjanjian bukanlah suatu kesalahan jenayah di bawah seksyen itu. Yang menjadi kesalahan jenayah ialah ketidakpatuhan kepada awad tribunal dan ianya tidak dalam apa-apa keadaan pun boleh berkuat kuasa kebelakangan kerana Tribunal hanya dapat memberi awad selepas 1 Disember 2002. Pada pendapat mahkamah ini s 16AD adalah tidak relevan kepada bidang kuasa Tribunal.

[213] Similarly, ss 28–30 of the CIPAA are only available to a party enforcing an adjudication decision and accordingly, the issue of retrospective application of those sections does not arise. Neither can those sections be said to take away or alter the vested rights of the parties under a construction contract as they relate only to enforcement of an adjudication decision.

[214] The same may be said about ss 13 and 37 of the CIPAA. Section 13 relates to the effect of an adjudication decision while s 37 declares the relationship between adjudication proceedings and other dispute resolution process. Section 13 only takes effect upon the existence of an adjudication decision which necessarily can only exist after the commencement of CIPAA. In essence, s 13 merely confirms the temporary binding nature of an

adjudication decision. This cannot be said to affect substantive rights of the parties so as to call for the presumption against retrospectivity to be applied to the entire Act.

[215] Section 37 also cannot be said to take away vested rights of the parties as that section merely confers benefit to parties in a dispute by allowing them to avail themselves to an interim forum prior to or concurrently with an arbitration or court proceeding. This section also again confirms the temporary nature of an adjudication decision in deciding the payment dispute between the parties. Reading this section with s 41 of the CIPAA, it is clear that adjudication as an intermediate forum is applicable to all payment disputes as long as the same have yet to be referred to an arbitration or court on the date of commencement of CIPAA. Accordingly, s 37 merely confers the benefit of an additional forum to deal with the dispute temporarily, pending final determination by a court or arbitration.

[216] Reference may be made to *Bennion on Statutory Interpretation* by Oliver Jones, (6th Ed), LexisNexis at p 295 for some insight on this aspect:

> Conferring of benefit
>
> If the retrospective construction would confer a benefit on some other person, or on the public generally, the principle against doubtful penalization obviously does not apply. Furthermore the fact that such a benefit is conferred may even outweigh the general presumption against retrospectivity. If to confer such benefits appears to have been legislator's object, then the presumption that an enactment should be given a purposive construction will carry great weight. This is the justification for not treating procedural provisions as vitiated by retrospectivity.

[217] The same may also be said of s 36 which introduces default provisions in the absence of terms of payment under a construction contract. As for s 35 of the CIPAA, aside from the earlier reasons, I find that this is a provision that is necessary as it takes away a defence that may be raised against meeting payment obligations. I agree with Mr Faisal that the conditional payment defence, if allowed, would defeat the entire operation of the Act.

[218] I also agree with his further arguments that s 35 is declaratory in nature in that it declares that any conditional payment provision in a construction contract as void. A declaratory provision can operate retrospectively as held in the decision of the Supreme Court of India in *Mithilesh Kumari & Anr v Prem Behari Khare* AIR 1989 SC 1247:

> In case of a qualifying or disqualifying statute it may be necessarily retroactive. For example when a Law of Representation declares that all who have attained 18 years shall be eligible to vote, those who attained 18 years in the past would be as much eligible as those who attained that age at the moment of the law coming into force. When an Act is declaratory in nature the presumption against retrospectivity is not

applicable. Acts of this kind only declare. A statute in effect declaring the benami transactions to be unenforceable belongs to this type. The presumption against taking away vested right will not apply in this case inasmuch as under law it is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been ceased by the Act. In one sense there was a right to recover or resist in 10/22/2014 *Mithilesh Kumari & Anr vs Prem Behari Khare* on 14 February, 1989 the real owner against the benamidar. *Ubi jus ibi remedium*. Where there is a right, there is a remedy. Where the remedy is barred, the right is rendered unenforceable. In this sense it is a disabling statute.

[219] Mr Faisal has offered, as an alternative argument that the court applies partial retrospective operation of the Act, leaving only s 35 to prospective operation. The court declines as there are ample reasons for a holistic construction and interpretation.

Purposive interpretation

[220] Then, there is the principle of purposive interpretation of statute. This principle which started off as a general principle of statutory interpretation is now statutorily enacted in s 17A of the Interpretation Acts of 1948 and 1967. Section 17A provides:

17A Regard to be had to the purpose of Act

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[221] I need go no further than the decision of the Federal Court in *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd*. At p 458, the Federal Court addressed the proper application of s 17A of the Interpretation Acts:

On the proper application of the provision of the said s 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 wherein this court had laid down the principles, inter alia, as follows:

In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed), says at p 566:

(1) Legislation is always to be understood first in accordance with its plain meaning.

(2) Where the plain meaning is in doubt the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.

(3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions

enacted, the courts will be prepared to adopt that reading.

(4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

(5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.

The choice prescribed in s 17A of '... a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object...' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. Thus, it is only when a provision is capable of bearing two or more meanings can s 17A be resorted to in order to determine the one that will promote the purpose or object of the provision, such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation ...

[222] In the event the court is in error and that s 2 is not as plain as I have suggested; that instead, it is capable of more than one meaning, that it applies prospectively and not retrospectively, the principle of purposive interpretation can be invoked to address that concern.

[223] Under such circumstances,and bearing in mind the object, intent and purpose of Parliament in enacting CIPAA as a choice of forum for a speedy, interim and relatively cheap resolution of payment disputes that arise in construction contracts, 'a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object'. The Federal Court examined the two interpretations advanced by the respective parties; found that the respondent's interpretation would advance the purpose of the Act and would do no violence to the plain meaning of both the Act and the said s 8(2A). Conversely, the appellant's interpretation of that section would not advance the purpose of the Act and s 8(2A).

[224] The interpretation offered by the plaintiffs would be to make available statutory adjudication only to a limited category of construction contracts or payment disputes whereas the intention of Parliament is plainly to make it

available to all; regardless. Taking the reading that CIPAA is available to all, regardless of when the construction contract or payment dispute arose would, in my judgment, do no harm or violence to the plain language of the Act, including ss 2, 3 and 41 or any other provisions in the Act.

[225] It is therefore the conclusion of this court that it is the clear intention of Parliament that CIPAA applies to all construction contracts regardless of when those construction contracts were made; and that would extend to the payment disputes that arise under those construction contracts. The Act applies so long as the construction contracts are made in writing and that such construction contracts are carried out either wholly or partly within the territory of Malaysia. The only exception to this are those payment disputes where proceedings in relation to such disputes have already been commenced either by way of court proceedings or arbitration before the operation of the Act, that is, before 15 April 2014.

Other issues of locus standi, scope of CIPAA, jurisdiction of the adjudicator etc

[226] These are substantive issues. Consistent with the approach taken by the court on the issue of the application and operation of CIPAA, this court takes the view that all these matters should be and are more properly to be taken up first before the adjudicator instead of before the court. CIPAA and statutory adjudication must be given a chance to breathe its first gulps of air. It would run counter to the intentions of Parliament if the court should immediately set about deciding these matters. The court therefore declines to entertain these issues at this stage.

CONCLUSION

[227] Consequently, the originating summonses in the first case and in the second case are dismissed. In keeping with good practice and in view of the importance and significance of this decision to the construction industry seeing that this is the court's first pronouncement on matters involving CIPAA and its operation, I had proposed, and all learned counsel had agreed, that there be no order as to costs in both cases; and I so order.

Applications dismissed with no order as to costs.

Reported by Kanesh Sundrum